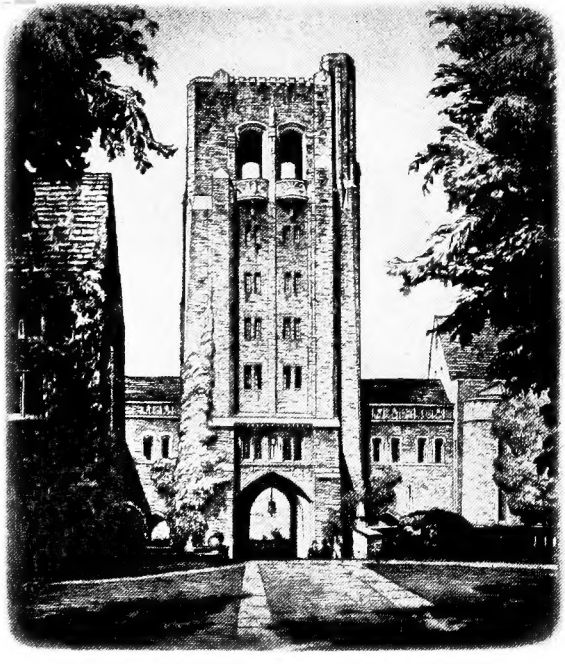


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A

DIGEST

OF

THE LAW OF REAL PROPERTY.

BY WILLIAM CRUISE, ESQ.

BARRISTER AT LAW.

REVISED AND CONSIDERABLY ENLARGED

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FURTHER REVISED AND ABRIDGED, WITH ADDITIONS AND NOTES, FOR THE USE OF AMERICAN STUDENTS,

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IN SEVEN VOLUMES.

VOLUME VI.

CONTAINING

Title 38. DEVISE. | Title 39. MERGER.

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A

DIGEST

OF THE

LAW OF REAL PROPERTY.

TITLE XXXVIII.

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BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 32.

KENT'S COMMENTARIES. Vol. IV. Lect. 68.

BACON'S ABRIDGMENT. Tit. *Legacies and Devises.*

(This title consists of the substance of a treatise, usually ascribed to Lord Chief Baron GILBERT.)

Ld. Ch. Baron GILBERT. Law of Devises, Last Wills, and Revocations.

JOHN JOSEPH POWELL. An Essay on Devises. With the Notes of Jarman.

RICHARD PRESTON. An Elementary Treatise on Estates. Vol. II. ch. 6. On Wills.

WILLIAM ROBERTS. A Treatise on the Law of Wills and Codicils.

THOMAS JARMAN. A Treatise on Wills. With the Notes of Mr. Justice Perkins.

JOHN GODOLPHIN. The Orphan's Legacy.

HENRY SWINBURNE. A Treatise of Testaments and Last Wills, &c.

JAMES HAWKSHEAD. An Essay on the Operation, in Wills, of the word "*Issue*," &c.

WILLIAM HAYES. An Inquiry into the Effect of the Limitation to "*Heirs of the Body*," in Devises, &c.

The Same. Principles for expounding Dispositions of Real Estate, &c.

CHARLES FEARNE. An Essay on the Learning of Contingent Remainders and Executory Devises. Butler's edition, with Smith's Notes.

JAMES WIGRAM. An Examination of the Rules of Law, &c., in aid of the Interpretation of Wills.

JAMES RAM. A Treatise on the Exposition of Wills of Landed Property.

FR. MANTICA. Tractatus de Conjecturis Ultimarum Voluntatum.

FERN. VASQUIUS. De Successionibus, et Ultimis Voluntatibus.

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CHAP. III.

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OTHER MATTERS RELATING TO EXECUTORY DEVISES.

CHAP. I.

ORIGIN AND NATURE OF DEVISES.

SECT. 1. *Origin of Devises.*
6. *Statutes of Wills.*
10. *Nature of a Devise under these Statutes.*
13. *A Codicil.*
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18. *A Devise transfers the Freehold.*
19. *And imports a Consideration.*
20. *Devises void against Creditors.*
25. *Devisees entitled to Aid in Equity.*
27. *A Will of Lands need not be proved in the Ecclesiastical Court.*

SECTION 1. THE last mode of conveying real property is by *devise*, or disposition contained in a person's last will and testament, to take place at the death of the devisor. The word *devisa*,

devise, appears to be *derived* from divide, and originally meant any kind of division or distribution of property. But it was used to denote a will or testament so early as in the time of Glanville, who says, *Potest enim quilibet homo, majoribus debitis non involutus, de rebus suis, in infirmitate suâ rationabilem devisam facere.* (*a*)

2. It is generally agreed, that the power of devising lands existed in the time of the Saxons; † but upon the establishment of the Normans, it was taken away as inconsistent with the principles of the feudal law; and although many of the restraints on alienation by deed were removed before Glanville wrote, yet the power of devising lands was not allowed for a long time after; partly from an apprehension of imposition on persons in their last moments; and partly on account of the want of that public notoriety which the common law requires *in every transfer of real property. It is therefore said, in the same chapter of Glanville from which the passage in the preceding section is taken, which relates to personal property only, that no one could dispose of his lands by will. *De hæreditate vero nihil in ultimâ voluntate disponere potest.* (*b*) [1]

4*

3. The power of devising continued however as to socage lands, situated in cities and boroughs, and also as to all lands in Kent, held by the custom of gavelkind; and as the ancient Saxon laws are supposed to have remained unaltered in Kent, this is an additional proof, that lands were generally devisable in the time of the Saxons. (*c*)

4. We have seen that a power of devising lands was indirectly acquired, by means of the invention of uses, and this power appears to have been not only allowed by the crown and the legislature, but even, in some particular instances, to have received their sanction; for by the statutes 7 Hen. VII. c. 3, and 14 & 15 Hen. VIII. c. 14, persons who were in the King's service in the

(*a*) (Glanv. lib. 7, c. 5.)
(*b*) 1 Inst. 111 b, n. 1, 2. 2 Inst. 7. Wright's Ten. 173. Tit. 32, c. 1.
(*c*) Lit. s. 167. Rob. Gav. 234.

[† The will of King Alfred is preserved in a Register of the Abbey of Newminster, and has been lately printed at Oxford.]

[1] Glanv. lib. 7, c. 1, 5. See also, Spence on the Equitable Jurisdiction of Chancery, Vol. I. p. 20, 136. 4 Kent, Comm. Lect. 68, sec. 1, p. 501–505.

wars were allowed to aliene their lands, for the performance of their wills, without license, or fine for alienation. (*a*)

5. The practice of *devising the use* of lands carried the power of disposing of real property much further than was consistent with the nature of tenures. It tended to deprive the lords of their wardships, profits of marriages, and reliefs; and the King of his primer seisin, livery, and fines for alienation; which constituted a considerable part of the ancient revenue of the crown. This, together with many other inconveniences that flowed from the doctrine of uses, was removed, by the statute 27 Hen. VIII. which, uniting the legal seisin of the land to the use, effectually took away the power of devising. (*b*)

6. The inconveniences which attended this restraint on the disposition of lands by devise, induced the legislature, in a few years after, to give to every proprietor of land a power to devise a portion of it. For this purpose an act was passed, 32 Hen. VIII. intituled, "The Act of Wills, Wards, and Primer Seisins," reciting, that persons of landed property could not conveniently maintain hospitality, nor provide for their families, the education of their children, or the payment of their debts, out of their goods and movables; it therefore enacts, that all and every person and persons, having manors, lands, tenements, or hereditaments, may give and dispose of them, as well by *last * 5
will and testament in writing, as by any act, executed in their lifetime, in the following manner: if they held in socage, they might devise the whole; and if they held of the King, or of any other person, by knight service, they might devise two parts, or as much as should amount to the yearly value of two parts in three, in certainty, and by special divisions, so as it might be known.

7. By the stat. 34 and 35 Hen. VIII. c. 5, intituled "The Bill concerning the Explanation of Wills," reciting that several doubts, questions, and ambiguities had risen upon the statute 32 Hen. VIII. it was enacted, (s. 3,) that the words, "*estate of inheritance*," used in that statute, should mean only an estate in fee simple. And it was further enacted, (s. 4,) "That all and singular person and persons, having a sole estate or interest in fee simple, or seised in fee simple, in coparcenary, or in common in

(*a*) Tit. 11, c. 2. (*b*) Idem.

fee simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise, to any person or persons, (except bodies politic and corporate,) by his last will and testament in writing, as much as in him of right is or shall be, all his said manors, lands, tenements, rents, and hereditaments, or any of them, or any rents, commons, or other profits or commodities out of, or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure." [1]

8. Under the authority of the above statutes, no more than two thirds of lands held by knight service, either of the King, or of a subject, could be devised; but in consequence of the abolition of military tenures, and the conversion of knight service and all the other old modes of holding lands into common socage, the operation of these statutes was extended to all freehold estates in fee simple.

9. The statutes of wills, being in the affirmative, were held not to take away the custom of devising; and formerly it was of importance, in many cases, to resort to the custom of devising, as being most beneficial for the devisee. But now, the two powers being assimilated and made for the most part commensurate, it can seldom happen that it should be necessary to call in aid the power by custom; though it is possible, as
6* where *the custom enables an infant of fourteen, or a *feme covert*, to devise lands. (*a*)

10. The idea of a devise of land was evidently taken from the *Testament* of the Roman law, which was at all times allowed in England, with respect to personal property. But the power of devising lands, being given by positive statutes, is only coextensive with the words of those statutes. A devise is therefore

(*a*) 1 Inst. 111, n. 4. 3 Rep. 35.

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[1] The language of the *earlier* Statutes of Wills in *Massachusetts* and *New Hampshire*, and of the present statutes of *Rhode Island* and *Alabama*, so far as concerns the seisin of the testator, is in substantial conformity to this statute of Hen. 8. See the observations of Jackson, J., in Osgood *v.* Breed, 12 Mass. 530; Alabama Rev. St. 1823, p. 883, § 2; R. Island Rev. St. 1844, p. 231. In other States, the power of devising is more broadly given. See *infra*, ch. 3, § 37, note.

founded on different principles, and governed by different rules, from a *testament*, which, in the English law, is only an instrument to transmit *personal property;* for a *devise* is considered, not so much in the nature of a testament, as of a conveyance, declaring the uses to which the *land* shall be subject after the death of the devisor.

11. The *word* "*testament*," in the *Roman law*, was applied only to dispositions which contained the institution or *appointment of an heir*, who was to take all the property of the testator; and the Roman lawyers observe, that a testament might be made in five words — *Quinque verbis potest quis facere testamentum; ut dicat, Lucius Titius mihi hæres esto.* (*a*) All *other dispositions*, in which there was no heir named, were called *codicils*, or donations in contemplation of death; but the English law does not admit of these distinctions, for a devise does not necessarily imply the appointment of a general heir, or a disposition of all the testator's lands, but only those which are particularly mentioned; and the residue descends to the heir, as if no such partial devise had been made.

12. It has been already stated, that *wills*, made *in execution of powers*, are, in fact, *appointments of uses;* but still that they have all the essential qualities of wills, or devises of land. (*b*)

13. A *codicil*, of which the name only is taken from the Roman law, is *a supplement to a devise*, or *an addition made by a testator to his will*, and of which it is considered as a part, being intended to alter or explain, or to make some addition to, or subtraction from, the former dispositions of the testator.

14. A person may therefore make several wills, of different parts of his lands, or of distinct estates and interests therein. He may also make several codicils, altering, explaining, adding to, or subtracting from what was before devised; or devising a part of his estate not disposed of by any former will or codicil; * and the law will annex such codicil or codicils *7 to his will, and consider the whole as one instrument.

* 15. The law has *not prescribed any particular form*, in which a will or codicil must be made: so that *any writing*, by which the *intention* of a person appears, to give or dispose of his lands,

(*a*) (Dig. lib. 28, tit. 5, l. 1.) (*b*) Tit. 32, c. 17.

after his decease, though in the form of a deed, will be considered as a good devise. (*a*)

16. C. Whitham, by indenture made between him of the one part, and Orbel and Skin of the other part, declared his intention to raise portions for his children, and to pay his debts; and thereby settled his lands on Orbel and Skin, in trust to sell the same, &c., and made them executors, to the uses aforesaid; and signed, sealed, published, and declared this to be his last will, in the presence of several witnesses. The Court of Chancery declared this to be a good will. (*b*)

17. In a modern case, which will be stated hereafter, Lord Loughborough, Mr. J. Buller, and Mr. J. Wilson held, that a deed poll, which was intended to operate after the death of the person who made it, and who had already published his will, to which it referred, should be considered as a codicil. (*c*)

18. In the case of a devise of lands, the *freehold is transferred to the devisee before entry;* and he may enter without the assent of the devisor's heir, to whom nothing descends. If the devisor's heir should enter on the lands devised, the devisee may bring an ejectment against him, which, however, is his only remedy. And those, to whom lands are given by devise, are said to *take in the nature of purchasers;* though the *bounty* of the testator is the only consideration supposed in a will. But it is settled that a devisee *may disagree* to, and disclaim a devise; in which case nothing will vest in him. (*d*)

19. A *devise imports a consideration in itself;* consequently there cannot be a resulting use upon it; nor can it be averred to be to the use of any other but the devisee. It is for this reason that a devise of lands cannot be averred at law to be a bar to dower, jointure, or any other right or interest to which the devisee may be entitled. It has, however, been stated, that in equity a devise is sometimes considered as a satisfaction; and it should be observed, that a will does not defeat a prior voluntary conveyance. (*e*)

8* *20. Soon after the Statute of Wills, it was found that

(*a*) (1 Jarm. on Wills, ch. 2, Perkins's ed.) [Bayley *v.* Bailey, 5 Cush. 245.]
(*b*) Hickson *v.* Whitham, Finch. R. 195. Green *v.* Proude, 1 Mod. 117. Clymer *v.* Littler, 1 Black. R. 345. (*c*) Habergham *v.* Vincent, 5 T. R. 92. 2 Vez. 204.
(*d*) 1 Inst. 111, a. 1 Show. R. 71. (2 Smith, Leading Cas. 408.) *Infra*, c. 8, § 42.
(*e*) Tit. 6, c. 4, s. 18. Tit. 11, c. 4. Tit. 32, c. 28, s. 49.

the power of devising was attended with some very material inconveniences; for creditors by bond or other specialty, which affected the heir, provided he had assets by descent, were defrauded of their securities; not having the same remedy against the devisee of their debtor. But by the statute 3 Will. and Mary, c. 14, it is enacted, (s. 2,) that all wills and testaments shall be deemed and taken, only as against creditor or creditors by bond or other specialty, in which the heirs are bound, their heirs, successors, executors, administrators, and assigns, to be fraudulent and utterly void. [By the third section, creditors were empowered to bring their actions against the heir and devisee; and by the fourth section it was provided, that devises for payment of debts or portions for the child or children of any person, (other than the heir at law,) in pursuance of contracts before marriage should be valid.

21. There were some cases of hardship for which the above statute did not supply a remedy; if there happened to be no heir, the creditor could not bring his action against the devisee; and it was decided, that the statute only applied to those cases of specialty debts, for which actions of debt could be brought, namely, for sums certain, but that it gave no remedy for damages for breach of covenants or contracts under seal. (*a*)

22. The statute of 1 Will. IV. c. 47, (*b*) repeals the above statute and substitutes other enactments in its stead: by this statute, as we have before noticed, the devisee is placed in the same situation as the heir, and the creditor may proceed against the devisee, or the devisee of such devisee, and not only in respect of bonds and covenants for sums certain, but of all other specialties. The fifth section enacts the proviso sect. 4, of the statute of Will. and Mary, omitting the words, "other than the heir at law." (*c*)

23. Mr. Fonblanque has observed, that in consequence of the fourth section of the statute of Will. and Mary, bond and other specialty creditors, whose demands do in their nature affect the lands, are still liable to be prejudiced by the right of their debtor to devise his real estate; for if he devise, subject to the payment of his debts, his simple contract creditors will by such devise be entitled to be paid *pari passu* with his bond or

(*a*) Wilson *v.* Knubley, 7 East, 128. (*b*) § 3, 4, 6, 8. (*c*) Vol. 4, p. 93.

9* *specialty creditors; because, in conscience, their debts are to be equally favored, being equally due. (*a*)

24. A case has been already stated, in which it was determined that an estate in reversion is within this statute; that a devise of the reversion by the heir of the obligor, is also within the act; and that, in such a case, the lands are liable. (*b*)

25. Persons who claim lands under a will, having the law on their side, are *entitled*, as against the heir of the devisor, to the aid and *assistance of a court of equity*, for a *discovery of the deeds and writings relating to the estate devised*, and to have them delivered up, as following the lands. This course of proceeding is said *arguendo* to be founded on the highest reason; for otherwise, all wills of land might be disappointed, and the heir at law, by obtaining possession, and getting the deeds into his custody, unless compelled to discover and produce them, in order to make out the title of the devisee, might defend himself at law, by setting up prior incumbrances, and by that means prevent a legal trial of the validity of the will, and totally frustrate the intention of the testator. (*c*)

26. A devisee is *also entitled*, in equity, to have any *incumbrance* which may be on the devised estate *paid off* for his benefit. (*d*)

27. A *will of freehold lands need not be proved* in the Ecclesiastical Court; although that is usually done; because most wills of land contain also a disposition of personal estate; for the probate of such a will cannot be given in evidence, because the proceedings, so far as they relate to freehold interests in land, are *coram non judice;* the Ecclesiastical Courts having no power to authenticate such instruments. (*e*)[1]

28. It is therefore frequently necessary to produce the original

(*a*) Treat. of Eq. B. 1, c. 4, s. 14. 1 Bro. C. C. 311. 4 Ves. 550.
(*b*) Kynoston *v.* Clarke, tit. 17, s. 31. (*c*) Newcastle *v.* Pelham, 3 Bro. Parl. Ca. 460.
(*d*) Tit. 15, c. 4, s. 4. (*e*) Cro. Car. 296, 346. 4 Burn's Eccl. Law, 195.

[1] In the United States, where Courts are constituted by statute, with general power to take the probate of wills, the statute is understood to confer complete jurisdiction over the probate of all wills, as well of real as of personal estate; and therefore to render their decrees conclusive upon this subject, in any other Courts. But in *New York*, *New Jersey*, *Maryland*, and *South Carolina*, the English rule has been followed. See 1 Greenl. Evid. § 550; 2 Greenl. Evid. 672; 1 Jarm. on Wills, 21, 22, note by Perkins. In *Maine*, *Massachusetts*, *Vermont*, *Florida*, and several other States,

will, and for that purpose to get it out of the Ecclesiastical Court, in which it was proved; and in such a case, an application must be made to the Court of Chancery, for an order to have the will delivered. (*a*)

29. This principle *does not*, however, *apply to wills of chattels real*, or terms for years, because they vest in executors; consequently they must be proved in the Ecclesiastical Court, having jurisdiction where the lands lie. (*b*)

(*a*) 1 Atk. 627. 4 Bro. C. C. 476. (*b*) Tit. 8.

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the probate is made conclusive, by statute. In *Ohio*, it is made conclusive after the lapse of two years.

[The Courts of the United States (i. e. the Federal Courts) have no probate jurisdiction. They receive the sentences of the Courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contents of a will. **Fouvergne** *v.* New Orleans, 18 How. U. S. 470.]

CHAP. II.

WHO MAY DEVISE, AND TO WHOM.

SECT. 1. *Who may Devise.*
2. *Who are disabled from Devising.*
3. *Infants.*
6. *Married Women.*
7. *Idiots and Lunatics.*
8. *Removal of Disabilities has no effect.*
13. *To whom Lands may be devised.*
14. *Unborn Infants.*
16. *Married Women.*
17. *Aliens.*
18. *Bastards.*
19. *Persons uncertain.*
20. *Bodies Politic cannot be Devisees.*
21. *Devisees must submit to the whole Will.*

SECTION 1. To the validity of every devise, it is necessary that there should be a devisor, capable of disposing of, and a devisee or devisees capable of taking, the lands devised. With respect to the persons who are capable of devising, *all those who have a power of disposing of their real estates* by any conveyance *inter vivos*, may dispose of them by will.[1]

2. With respect to the *persons who are disabled from devising lands*, the Statute of Wills mentions *four personal disqualifications* to the power of devising.[2]

3. The first of these is *infancy;* and therefore persons, under the age of twenty-one years, are incapable of devising their lands. But if there be a local custom that lands and tenements, within a certain district, shall be devisable by all persons of the

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[1] In England, persons attainted of treason, or convicted of felony, are incapable of making an effectual devise, by reason of the forfeiture of their estates. 1 Roberts on Wills, p. 30, 31. But in the United States, that incapacity no longer exists. See *ante*, tit. 1, § 67, note; tit. 29, ch. 2, § 20; tit. 30, § 11, note; Rankin *v.* Rankin, 6 Mour. 531.

[2] The subject of the personal disabilities of testators, is treated by Mr. Justice Perkins in his additional chapter 3, in his second edition of Jarman on Wills, Vol. I. p. 28–80, with an accuracy of discrimination and extent of research which will richly reward the diligent student's perusal.

age of fifteen years or upwards, a devise of such lands by an infant of fifteen will be good.[1]

4. An *infant* may devise the *guardianship of his child*, by virtue of the statute 12 Cha. II. c. 24;[2] and it has been contended, that such a disposition will draw after it the land, as incident to the guardianship; but this point has not been determined. (*a*)

5. *Married women* are also expressly disabled, by the Statute of Wills, from devising their lands.[3] But married women are now

(*a*) Bedell *v.* Constable, Vaugh. 177.

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[1] In the States of *Vermont*, *Maryland*, *Ohio*, *Illinois*, and *Mississippi*, unmarried females are, by statute, made capable of devising their estates at the age of eighteen. See LL. Maryl. Vol. I. p. 370, ch. 101, sub ch. 1, § 3, Dorsey's ed.; Ohio Rev. St. 1841, ch. 59, § 1, ch. 129, § 1; Illinois Rev. St. 1839, p. 686; Mississippi Rev. St. 1840, ch. 36, § 2; Vermont Rev. St. 1839, ch. 45, § 1, ch. 65, § 1.

[2] This provision is found in the statutes of *Connecticut*, *New York*, *New Jersey*, *Virginia*, *North Carolina*, *Alabama*, *Georgia*, *Kentucky*, *Tennessee*, and *Mississippi*. In the statutes of *Rhode Island* and *Pennsylvania*, the power of appointing a guardian by will is restricted to those fathers who are authorized by law to make a will. In the laws of *Indiana*, *Michigan*, *Ohio*, *Florida*, *Arkansas*, *Delaware*, *Maine*, and *Massachusetts*, the language is general, that "every father," "the father," "a father," may appoint a testamentary guardian to his children. But, whether fathers under age are empowered by this general language, is not known to have been judicially determined. See *infra*, § 5, note. See also 2 Kent, Com. 225.

[3] The same disability is expressed in the statutes of *Rhode Island*, *New York*, *New Jersey*, *Delaware*, *Virginia*, *Georgia*, *Kentucky*, and *Indiana*. But it is conceived that in these States, a testamentary disposition of her estate by a married woman, made pursuant to a power contained in a marriage settlement, or other ante-nuptial contract, would be enforced as a valid appointment; those statutes being merely in affirmance of the common law; 4 Kent, Comm. 505, 506; Osgood *v.* Breed, 12 Mass. 525, 530; Marston *v.* Norton, 5 N. Hamp. 205; West *v.* West, 10 S. & R. 446.

In *Missouri* and *Arkansas*, married women are expressly empowered, by statute, to devise their own separate estates, if so authorized by an ante-nuptial agreement with the husband. In such cases, the disposition would seem to be strictly a devise, operating directly, and *proprio vigore*, without the aid of chancery, or other instrumentality.

In *Massachusetts*, the wife is authorized, by statute, in all cases, to devise and dispose of her estate by will, if the husband indorses his assent thereon. [Where all the devises in the will are to the husband, or for his benefit solely, he need not indorse his assent and approval thereon. Stat. 1850, ch. 200. By the statute of 1855, ch. 304, § 5, it is provided, that "any woman hereafter married, may, while married, make a will; but such will shall not deprive her husband of his rights as tenant by the curtesy, and she shall not bequeath away from him more than one half of her personal property, without his consent in writing; and any woman now married, may make a will of her real estate, which, however, shall not deprive her husband of his rights as tenant by the curtesy."] In *Michigan*, also, the same power is given to her, provided the written assent of the husband be annexed to the will, and signed, attested, and proved in the

frequently enabled to dispose of lands by wills, operating as appointments under powers contained in conveyances to uses. (*a*)

6. A woman whose husband has abjured the realm, or
14* who* has been banished for life by act of parliament, may in all things act as a *feme sole;* and may therefore make a will of her lands. (*b*)

7. The two other disabilities, which are expressly mentioned in the Statute of Wills, are *idiocy*, and *nonsane memory*, or *lunacy*. But it should be observed, that every person who makes a will is presumed to be of sound understanding, till the contrary is proved; so that the *onus probandi* lies on the other side. (*c*) [1]

(*a*) Tit. 32, c. 13. (*b*) 1 Inst. 133 a, 3 Bulst. 188. Portland *v.* Prodgers, 2 Vern. 104.
(*c*) *Vide* Att.-Gen. *v.* Parnther, 3 Bro. C. C. 441.

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same manner. In *New Hampshire*, a married woman may devise her real estate; but not to affect injuriously the rights of her husband. In *Maine*, *Connecticut*, *Pennsylvania*, and *Illinois*, married women are in express terms included among the persons authorized to dispose of their own estates by will, without restriction. In *Ohio*, the *general* language of the statute is understood to include married women; who are therefore held capable of devising. Allen *v.* Little, 5 Ham. 65. In several other States, the language of the statute is equally general, giving the power of disposing estates by will, to "every person," or "all persons," of full age and sound mind; but whether this general language has been adjudged to include married women, is not certainly known. By the former statutes of *Massachusetts* and *New Hampshire*, this power was given to "every person lawfully seised," &c.; but it was held not to include married women; in the former State, as well because they were not *seised*, within the meaning of the statute, as on general principles; but in New Hampshire, on the latter ground alone. Osgood *v.* Breed, *supra;* Marston *v.* Norton, *supra.*

See Mich. Rev. St. 1846, ch. 68, § 1; Misso. Rev. St. 1845, ch. 185, § 3; Ark. Rev. St. 1837, ch. 157, § 2; Conn. Rev. St. 1849, tit. 14, ch. 1, § 1; Pennsylvania Dunl. Dig. ch. 858, § 7; Mass. Stat. 1842, ch. 74; N. Hamp. Stat. 1845, ch. 169, § 1; Maine Stat. 1848, ch. 73, § 3; Illinois Rev. Stat. 1839, p. 686.

In all the States, persons of full age and sound mind, legally capable of conveying their estates by deed, may dispose of them by will.

Where a married woman has power, by an ante-nuptial settlement, or any other agreement, to dispose of her estate by will, or by a testamentary appointment in the nature of a will; the instrument disposing of the estate must be proved as a will, in the Court having jurisdiction of the probate of wills, before it can be acted upon elsewhere. Osgood *v.* Breed, 12 Mass. 533, 534; Picquet *v.* Swan, 4 Mason, 461, 462; Newburyport Bank *v.* Stone, 13 Pick. 423; Tappenden *v.* Welch, 1 Phillim. 353; Temple *v.* Walker, 3 Phillim. 394; West *v.* West, 3 Rand. 373; Ross *v.* Ewer, 3 Atk. 160; Holman *v.* Perry, 4 Me. 496, 498.

[1] See to this point, Pettes *v.* Bingham, 10 N. Hamp. 514; Hoge *v.* Fisher, 1 Pet. C. C. R. 163; Stevens *v.* Vancleve, 4 Wash. 262; Brooks *v.* Barrett, 7 Pick. 99; 1 Greenl. on Evid. § 42; Hix *v.* Whittemore, 4 Met. 545. [See also Cilley *v.* Cilley, 34 Maine (4 Red.) 162; Cramer *v.* Crumbaugh, 3 Md. 491; Townshend *v.* Townshend, 7 Gill. 10; Trumbull *v.* Gibbons, 2 New Jer. 117.]

8. Where a devisor is under any of the disabilities before mentioned, at the time when the will is made, it is absolutely

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But if a state of insanity is once proved to exist, it is presumed to continue, and the burden of disproving it is devolved on the other side; unless the insanity appears to have been temporary in its nature, such as the delirum of a fever, or the like. Hix *v.* Whittemore, *supra;* Stevens *v.* Vancleve, *supra;* Jackson *v.* Van Dusen, 5 Johns. 144; Kinloch *v.* Palmer, 1 Rep. Const. Ct. 216; 1 Greenl. on Evid. § 42; Halley *v.* Webster, 8 Shepl. 461; Black *v.* Ellis, 3 Hill, S. Car. Rep. 68.

There is an apparent exception to this rule, in the case of the *probate* of a will; but it will be found to be rather apparent than real. In such cases, the proceedings not being according to the course of the common law, the *onus probandi* on this point is not technically presented; but the issue is a complicated proposition, involving all the facts which the statute has made essential to a valid will, all which the executor in propounding the will, affirms to exist, and therefore is bound affirmatively to show. This he does, in the matter of sanity, by the affirmative answer, given in general terms by the attesting witnesses, to the formal question always put to them on such occasions, namely, whether, in their *opinion*, the testator was, at that time, of sound and disposing mind and memory. This slight proof, aided as it is by the legal presumption in favor of sanity, is sufficient to devolve on the other party the burden of proving the contrary. The opinions held by learned Judges on this point have been collected by Mr. Perkins, in a note to his last edition of Jarman on Wills, Vol. I. p. 72, which is here transcribed. "In Brooks *v.* Barrett, 7 Pick. 98, 99, Parker, C. J. said:—'By our Statute of Wills, all such instruments must be offered for probate in the Probate Court, and the subscribing witnesses are to be there produced; and these witnesses are to testify, not only as to the execution of the will, but as to the state of the mind of the testator at the time.' Without such proof no will can be set up. And this agrees with the English law on the same subject. Powell on Devises, 70; Wallis *v.* Hodgeson, 2 Atk. 56;" Barry *v.* Butlin, 1 Curteis, 637. 'Being proved, however, by the subscribing witnesses both as to its execution and the sanity of the testator, the will is to be set up and allowed, unless the party objecting disproves the facts thus established. So that the burden of proof shifts from the executor to the heir, or other person opposing the allowance of the will; but in this, as in all cases where there is an affirmative point to be made out by one party, he is to open and close to the jury. If his own evidence, that of the subscribing witnesses, is deficient, he is to make out the affirmative from the whole case; if he makes out his case by the statute evidence, he has only to defend against the proof of insanity produced by the other party. And having produced the statute evidence, if the case is made doubtful by the evidence from the other side, the presumption of law in favor of sanity must have its effect on the final decision. Buckminster *v.* Perry, 4 Mass. 395.'

[The law on this point in Massachusetts has been revised in the recent case of Crowninshield *v.* Crowninshield, 2 Gray, 524. The Court say: "When a will is offered for probate, to entitle it to such probate, it must be shown that the supposed testator had the requisite legal capacities to make the will, to wit, that he was of full age and of sound mind, and that in the making of it the requisite formalities have been observed. The heirs at law rest securely upon the statutes of descents and distribution, until some legal act has been done by which their rights under the statutes have been lost or impaired.

"Upon whom, then, is the affirmative? The party offering the will for probate says,

void; although the disability be removed before the death of the devisor; for the party *must be capable of devising at the time when the will is published.*

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in effect, This instrument was executed with the requisite formalities by one of full age and of sound mind; and he must prove it; and this is to be done, not by showing merely that the instrument was in writing, that it bears the signature of the deceased, and that it was attested in his presence by three witnesses; but also that it was signed by one capable of being a testator, one to whom the law had given the power of making disposition of his property by will. . . . .

"We can perceive no shifting of the burden of proof; the issue throughout is but one: Was the testator of sound mind? And the affirmative of this was upon the party offering the will for probate. Again; that issue is an issue of fact, and is to the jury. And how is the Court to determine when the will is 'proved' or 'sufficiently proved' by the subscribing witnesses, 'so that the burden of proof shifts from the executor to the heir?' It is a question of the effect of evidence, and could only be solved by probing the mind of each juror. Suppose the attesting witnesses are divided in opinion; one for the sanity of the testator, one against, the other doubtful; or that two testify against the sanity of the testator, and the third that he was of sound mind, and the jury place greater confidence in the means of observation, intelligence, judgment and integrity of the one than of the other two; or that all three testify (a case not without precedent), so far as it is matter of opinion, in favor of the sanity of the testator, yet, in view of all the facts and the circumstances detailed by the same witnesses, the jury reach a very different conclusion. If there could be a shifting of the burden upon a single issue, it would be impossible to tell when the burden is to be transferred from the one party to the other.

"It is quite difficult to understand what was meant by the Court when they said, that 'if he [the executor] makes out his case by the statute evidence, he has only to defend against the proof of insanity produced by the other party.' The law has made no further distinction between the attesting and other witnesses, than that the opinions of the former may be given in evidence; and even this distinction does not extend to professional witnesses. If the three attesting witnesses, being comparative strangers to the testator, and called in for the mere purpose of witnessing the will, testify that, so far as they saw, the testator was of sound mind; and the attending physicians, familiar with the facts and with the history of the party, testify that he was insane; the law attaches no peculiar weight to the testimony of the former as against the latter. Still less does it give it any such preponderance as to shift the burden of proof. The issue, after the evidence is all in, is precisely the same that it was at the beginning,—Was the testator of sound mind?—an issue in its very nature incapable of division.

"Nor does the existence of a general presumption that men are sane change the burden of proof. It may stand in the stead of proof; it may make a *primâ facie* case; where the question of sanity is made, it may render necessary greater weight of evidence in him who seeks to impeach it; but it does not change the burden of proof. But when the evidence is in, on the one side and the other, the issue still continues as before; and he, to whose case the proof of such sanity is necessary, has the burden. To use the language of the Court in Powers *v.* Russell: 'Where the proof on both sides applies to one and the same proposition of fact, the party, whose case requires the proof of that fact, has all along the burden of proof; though the weight in either scale may at times preponderate.' 13 Pick. 76.

9. A man of full age declared, in the presence of several witnesses, that his will, made when he was under age, should

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"But we are by no means satisfied that, in relation to wills, there is any legal presumption, in this Commonwealth, of the sanity of the testator. If such presumption exists, no proof that the testator was of sound mind would be necessary, until those opposing the will had offered some evidence to impeach it. The presumption of sanity would be sufficient, until there was something to meet it. Yet our cases uniformly hold that the party seeking probate of the will must produce the attesting witnesses to show not merely the execution of the instrument, but the sanity of the testator at the time of its execution. And such has been, we think, the uniform practice in the Probate Courts, and in this Court sitting as the Supreme Court of Probate. These cases were decided, and this practice grew up, under the explicit language of the stat. of 1783, ch. 24, § 1, which provided that 'every person lawfully seised of any lands, &c., of the age of twenty-one years and upwards, and of sane mind, shall have power to give, dispose of and devise the same.' The language of the Revised Statutes is to the same effect: 'Every person of full age and of sound mind.' Rev. Sts. ch. 62, §§ 1, 5.

"There are strong reasons why the same presumption as to sanity should not attach to wills as to deeds and ordinary contracts. Wills are supposed to be made *in extremis*. In point of fact, a large proportion of them are made when the mind is to some extent enfeebled by sickness or old age. It is for this reason that the execution of the will and the proof of its execution are invested with more solemnity; the statute requiring it to be attested by three or more competent witnesses; making void all beneficial devises, legacies or gifts to such subscribing witnesses; and requiring the presence of the three in the Probate Court for its proof, unless it appears by consent in writing of the heirs at law, or other satisfactory evidence, that no person interested intends to object to the probate of the will. Rev. Sts. ch. 62, §§ 6, 8, 15. We speak of what seems to be the rule in this Commonwealth, under the stat. of 1783, ch. 24, and the Rev. Sts. ch. 62.

"There is, no doubt, conflict and confusion in the authorities on this point, both in England and in this country. A general legal presumption doubtless exists, that a man is sane, till there is evidence to the contrary; and upon proof of the execution of a contract, or of a deed, no proof need be given that the maker was of sound mind when he executed it. The presumption is sufficient, until evidence is produced to meet it. This presumption has often been applied to the proof of wills, but not in our own courts. Nor is the rule elsewhere uniform.

"If there were uniformity in the English decisions, which there certainly is not, we should not overlook the difference between the English Statute of Wills, 34 Hen. 8, ch. 5, and our own. Our own provides that 'every person of full age and of sound mind' may make a will; making these capacities of full age and sanity, of the nature of conditions precedent. The St. of Hen. 8, enacts, in § 4, that 'all and singular person or persons having estate or interest in fee simple, &c., in lands, &c., shall have full and free liberty, to give, dispose, will or devise to any person or persons, &c., by his last will and testament in writing, as much as in him of right is or shall be, his said lands, &c., at his own free will and pleasure;' and then, by § 14, provides that 'wills or testaments made of any lands, &c., by any woman covert, or person within the age of twenty-one years, or by any person *de nonsane* memory, shall not be taken to be good or effectual in the law;' thus making, in the first place, a general provision applicable to all persons whatsoever, and then excepting out of its operation, and making ineffectual, wills of persons of nonsane memory. If, therefore, it were the uniform

stand; it was however adjudged that the will was void, on account of the infancy of the devisor at the time of the first

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construction of this statute that when a will was produced, and its due execution proved, it was to be taken to be good and effectual, unless for some of the causes stated in the fourteenth section it was shown not to be good or effectual, it would furnish no precedent for the construction of our own statute, which in terms limits the power to persons of full age and sound mind.

"On the whole matter, we are of opinion, that where a will is offered for probate, the burden of proof, in this Commonwealth, is on the executor or other person seeking such probate, to show that the testator was, at the time of its execution, of sound mind; that if the general presumption of sanity, applicable to other contracts, is to be applied to wills, it does not change the burden of proof; that the burden of proof does not shift in the progress of the trial, the issue throughout being one and the same; and that if, upon the whole evidence, it is left uncertain whether the testator was of sound mind or not, then it is left uncertain whether there was under the statute a person capable of making the will, and the will cannot be proved."]

"In Gerrish *v.* Nason, 22 Maine, 438, 440, 441, Whitman, Ch. J., said: 'The power to make wills, and the manner of executing them, and their efficacy, depend upon certain special provisions of statute law. One of which is, that every person of sound mind, and of the age of twenty-one years, may dispose of his estate by will.' 'The presumption, that the person making a will was, at the time, sane, is not the same as in the case of making other instruments; but the sanity must be proved.' In Barry *v.* Butlin, 1 Curteis, 637, Mr. Baron Parke said: 'The strict meaning of the term '*onus probandi*,' is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases this *onus* is imposed on the party propounding a will; it is in general discharged by proof of capacity, and the fact of execution.' In Harris *v.* Ingledew, 3 P. Wms. 93, Sir Joseph Jekyll, M. R., said: 'It must be observed, that the proof of a *will* is attended with more solemnity than that of a deed; the former being supposed to be made when the testator is *in extremis*, and therefore in equity it is necessary to prove the sanity, which is all presumed in the case of the latter.' 'Sanity is the great fact which the witness to a will has to speak to, when he comes to prove the attestation, and this is the true reason why a will can never be proved as an exhibit *viva voce* in chancery, though a deed may be; for there must be liberty to cross-examine as to sanity.' Shelford, Lunacy, 283, 284; Hindson *v.* Kersey, 4 Burn, Eccl. Law, 102. In conformity to this doctrine, it was said by Lord Chancellor Hardwicke, (Wallis *v.* Hodgeson, 2 Atk. 56,) that it had been determined over and over again in the Court of Chancery, that it must be shown, that the devisor was of sound and disposing mind when a will was to be established as to real estate; proving that it was well executed, according to the Statute of Frauds and Perjuries, was not sufficient.'

"In Comstock *v.* Hadlyme, 8 Conn. 261, Williams, J., said: 'The real question to be tried was, whether there was a valid will; and this question was to be decided in the same manner as if it had not been decided in the Court of Probate. Those who claim under the will must, therefore, take upon themselves the burden of proof; and they must not only prove that the will was formally executed, but that the testator was of a sound and disposing mind.' See Harrison *v.* Rowan, 3 Wash. C. C. 582.

"It is extremely difficult to reconcile all the observations of learned Judges on this point. In Pettes *v.* Bingham, 10 N. Hamp. 515, Parker, Ch. J., said: 'It is probably usual, in Probate Courts, upon proof of a will, to inquire of the subscribing witnesses

publication. But if the will had been *republished, after the devisor attained his full age*, it would have been good. (*a*)

10. It is the same, where a married woman makes a will, and afterwards becomes a widow; for the will was void in its inception. (*b*)

11. Thus, it is said by Lord Keeper Wright, that if a will is made by a feme covert, of lands of inheritance, to J. S., and the baron dies, and then the wife dies, though her intention is plain, and though after the decease of the baron, when she became *sui juris*, she might have devised the lands to J. S., or by a republication have made the former will good, yet it was not relievable in equity. (*c*)

12. It is laid down by Lord Ch. J. Trevor, that if a man be

(*a*) Hawe *v.* Burton, Comb. 84. 1 Salk. 238. (*b*) 11 Mod. 157. (*c*) 2 Vern. 475.

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whether the testator was of a sound and disposing mind; but it seems to be well settled, that every man is presumed to be sane, until there is some evidence shown to rebut that presumption.'

"In Chandler *v.* Ferris, 1 Harrington, 454, 461, Clayton, Ch. J., remarked: 'We are not to be governed by the question, who affirms or who denies the issue, but where is the *onus probandi*. The burden here is upon the caveators; they do not deny the execution of the will, but set up insanity and such an influence exercised by others over the testator's mind as will vitiate the will. After the formal proof of the paper, the executor might fold his arms until the caveators produced something to overthrow his case, which is *primâ facie* established by the production of the will and the inference of law in favor of sanity.'

"In Sloan *v.* Maxwell, 2 Green, Ch. 580, it is said to be a fixed principle, 'that whenever the formal execution of a will is duly proved, he who wishes to impeach it on the ground of incompetency, must support, by proof, the allegation he makes, and thereby overcome the presumption which the law raises of the sanity of the testator.'

"On a trial where the sanity of the testator is in question, the party setting up the will goes forward and has the opening and close. Comstock *v.* Hadlyme, 8 Conn. 261; Brooks *v.* Barrett, 7 Pick. 94; Ware *v.* Ware, 8 Greenl. 42; Phelps *v.* Hartwell, 1 Mass. 71, 73, and note; Buckminster *v.* Perry, 4 Mass. 593.

"But in Delaware, the party alleging the insanity of the testator has the opening and close, where he does not deny the formal execution of the will. Chandler *v.* Ferris, 1 Harrington, 460, 461; Bell *v.* Buckminster, and Cubbage *v.* Cubbage, Ib. notes.

"On an appeal from the ordinary to the Court of Common Pleas, in South Carolina, in the case of a will, the matter is not to be tried *de novo*. The appellee having the decision of the Court below in his favor, his rights are held to be fixed. The appellant files a suggestion, setting forth the proceedings in the ordinary's court, and then assigns specifically the supposed errors of the judgment of that Court. The appellant becomes the actor; he affirms the truth of the issues, whether on the question of sanity or otherwise, and has the opening and close, in the evidence and argument. Southerlin *v.* M'Kinney, Rice, 35; Tillman *v.* Hatcher, Rice, 271." See also 1 Greenl. on Evid. § 77.

non compos, and not in his right mind, at the time of making his will, though he afterwards, never so long before his death, becomes a man of understanding, and sound judgment and memory, yet the will is void, and can by no means be made good, because he wanted the disposing power at the time of making the will. (*a*)

13. *All natural persons*, who are *in esse* at the time when a will is made, and who are *capable of acquiring lands by purchase*, such as infants, &c., *may be devisees.*

14. It was formerly much doubted, whether an *unborn*
15 * *infant*, * but *in ventre matris*, could be a devisee in a will. It is, however, now settled, that such a devise is good.[1]

15. A person devised to his brother Henry Clarke and his assigns, for his life, remainder to the use and behoof of all and every such child or children of his said brother as should be living at the time of his decease. Henry Clarke died, leaving several children, and his wife pregnant, who was delivered seven

(*a*) 11 Mod. 157.

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[1] Posthumous children are recognized as entitled to inherit; and by parity of reason may be devisees. Such, therefore, is now the settled law in the United States, as well as in England. See *ante*, tit. 16, ch. 4, § 13, note; tit. 29, ch. 2, § 10, note. [Hone *v.* Van Schaick, 3 Barb. Ch. R. 488.]

In many of the United States, provision is made by statute, for the case of children, born after the making of the will, but before the death of the testator, who have not been advanced by him, and for whom no provision has been made in the will; their case being apparently one of unintentional pretermission. These are, in those States, entitled to receive their distributive share of the estate, in the same manner as if the testator had died intestate; the share being made up by contribution among the devisees. Such is the general course of legislation on this subject; though the methods of carrying the provision into effect, and other details, and qualifications, are somewhat varied in the different States. See *Maine*, Rev. St. 1840, ch. 92, § 18; *Massachusetts*, Rev. St. 1836, ch. 62, § 21, 22; *New Hampshire*, Rev. St. 1842, ch. 56, § 9; *Vermont*, Rev. St. 1839, ch. 45, § 25, 26; *Rhode Island*, Rev. St. 1844, p. 232; *New York*, Rev. St. Vol. II. p. 125, § 41, 3d ed.; *New Jersey*, Rev. St. 1846, tit. 10, ch. 10, § 21; *Virginia*, Tate's Dig. p. 892, 893; *North Carolina*, Rev. St. 1836, Vol. I. ch. 122, § 16–24. [Johnson *v.* Chapman, Busbee, Eq. 213; Dupree *v.* Dupree, Ib. 164.] *South Carolina*, St. at Large, Vol. V. p. 107, 572; *Ohio*, Rev. St. 1841, ch. 129, § 43, 44; *Michigan*, Rev. St. 1846, ch. 68, § 25, 26; *Kentucky*, Rev. St. 1834, Vol. II. p. 1539, 1540, § 3; *Indiana*, Rev. St. 1843, ch. 30, § 10; *Illinois*, Rev. St. 1839, p. 689, § 12; *Missouri*, Rev. St. 1845, ch. 185, § 11; *Mississippi*, Rev. St. 1840, ch. 36, § 3, 4; *Arkansas*, Rev. St. 1837, ch. 157, § 11, 12. And see 4 Kent, Comm. 524–526; 1 Jarm. on Wills, 107, note by Perkins.

months after of a daughter. The question was, whether the posthumous child took any thing under this devise. (*a*)

Lord Ch. J. Eyre said, it was plain, on the words of the will, the testator meant that all the children, whom his brother should leave behind him, should be benefited. But, independent of this intention, he held that an infant *in ventre matris*, who by the course and order of nature was then living, came clearly within the description of children at the time of his decease. Judgment was given accordingly.

16. A *married woman* is not thereby disabled from being a devisee in a will. And although she cannot take any thing from her husband directly by deed, yet neither the custom of devising, nor the Statute of Wills, disqualify a wife from being the devisee of her husband; because the devise does not take effect till the death of the husband, by which the marriage is dissolved, and they cease to be one person. (*b*)

17. Lord Hardwicke has said, there is no rule of law, or upon the Statute of Wills, to prevent *an alien* from taking by devise, although it is a matter of doubt for whose benefit he is enabled to take. (*c*) [1]

18. A *bastard* may be a devisee of land, but he must have gained a name by reputation; and therefore a devise to a bastard, *in ventre matris*, is void, for he cannot have acquired a name by reputation till he is born. (*d*) [2]

(*a*) Doe *v.* Clarke, 2 Hen. Black. 399. 1 Bro. C. C. 320, S. C. 2 Ves. 673. Thellusson *v.* Woodford, 4 Ves. 334. 2 Veas. & Bea. 367.

(*b*) Lit. s. 168. 1 Inst. 112 a. (4 Kent, Comm. 506.)

(*c*) 2 Vez. 362. (2 Kent, Comm. 61.)

(*d*) 1 Inst. 3 b. & n. 1. Metham *v.* Devon, *infra*, c. 10, § 35.

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[1] In most of the United States, aliens are now capable of holding real estate for their own benefit. See *ante*, tit. 1, § 39, note; Tit. 29, ch. 2, § 12, note; Tit. 32, ch. 2, § 32. But in *New York*, an alien cannot take by devise, if he remain an alien at the death of the testator. New York Rev. St. Vol. II. p. 118, § 4, (3d ed.); [Meakings *v.* Crowell, 1 Selden, (N. Y.) 136; Wadsworth *v.* Murray, 16 Barb. 601.]

[2] It is now settled, that a devise to an illegitimate child *in ventre matris*, without reference to the father, is valid, if the mother is sufficiently described. Pratt *v.* Flamer, 5 H. & J. 10. And see Gardner *v.* Heyer, 2 Paige, 11; Beachcroft *v.* Beachcroft, 1 Madd. 234; 2 Kent, Comm. 217, (5th ed.); Earl *v.* Wilson, 17 Ves. 528. In this last case the principle of this rule is clearly expounded.

"Where there are legitimate children to answer the description of 'children,' the rule of law is, that legitimate children only can take. Bayley *v.* Mollard, 1 Russ. & My. 581; Frazer *v.* Pigott, 1 Young, 354; 2 Williams, Ex. (2d Am. ed.) 803; Shear-

19. A devise to a *person uncertain*, as, to such of the daughters of A as shall marry a man of the name of Norton, is good. And a devise to a person not in existence at the time when the will is made, as to the first son of A. B., who has then no son, may be good, by the way of remainder or expectory devise. (*a*)

20. *Bodies politic* and *corporate* are expressly disabled by the statute 34 & 35 Hen. VIII. c. 5, s. 14, from taking by devise, in conformity to the spirit of the laws against mortmain. It was, however, formerly held, in consequence of the statute 43 Eliz. c. 4, in support of charitable uses, that a devise to a cor-
16 * poration, * for a charitable use, was valid, as operating in the nature of an appointment. But now, by the statute 9 Geo. II. devises to *charitable* uses are rendered void, with certain exceptions. (*b*) † [1]

(*a*) Bate *v.* Amherst, T. Raym. 82. Blackburn *v.* Stables, 2 Veas. & Bea. 367. (2 Jarm. on Wills, 259.) (*b*) Tit. 32, c. 2, § 35.

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man *v.* Angel, 1 Bai. Eq. 351; Wilkinson *v.* Adam, 12 Price, 470; Gardner *v.* Heyer, 2 Paige, 11; Ram on Wills, ch. 6, p. 50, 51; Meredith *v.* Farr, 2 Younge & C. (N. S.) V. Ch. 525. But natural children may take under this description, if the will itself manifests an intent to include them in the term 'children,' either by express designation, or by necessary implication. Wilkinson *v.* Adam, 1 Ves. & Bea. 462; S. C. 12 Price, 470. The proof of the intent to include natural children in the term 'children,' must come from the will only; extrinsic evidence being inadmissible to raise a construction by circumstances, except for the purpose of showing that illegitimate children have, at the date of the instrument, acquired the reputation of the children of the testator, or the person named in the instrument. Wilkinson *v.* Adam, 1 Ves. & Bea. 422; Swaine *v.* Kennerley, Ib. 469; Gardner *v.* Heyer, 2 Paige, 11; Collins *v.* Hoxie, 9 Paige, 88; Shearman *v.* Angel, 1 Bai. Eq. 351. See also Harris *v.* Lloyd, 1 Turn. & Russ. 310; Mortimer *v.* West, 4 Russ. 370; 2 Williams, Ex. (2d ed.) 804, 805; 4 Kent, (5th ed.) 413, 414; Cooley *v.* Dewey, 4 Pick. 93; Brewer *v.* Blaugher, 14 Peters, 178; Heath *v.* White, 5 Conn. 228. An illegitimate child may take by particular description, before its birth. Dawson *v.* Dawson, Madd. & Geld. 292; Evans *v.* Massey, 8 Price, 22; Gordon *v.* Gordon, 1 Meriv. 141; 2 Williams, Ex. (2d Am. ed.) 805, 806." 2 Jarm. on Wills, 93, (2d Am. ed.) note by Perkins.

In *South Carolina*, a devise to the testator's concubine, or his bastard child, must not exceed one fourth of his clear estate, if he have also a lawful wife and children. S. Car. St. at Large, Vol. V. p. 271.

[† It is now settled that the following testamentary dispositions to charities are within the operation of the act of 9 Geo. 2, ch. 36, (namely): I. Money charged on real estate. Arnold *v.* Chapman, 1 Vez. 108. II. Money produced by sale of real estate. Att.-Gen. *v.* Weymouth, Amb. 20; also 14 Ves. 364; 6 Mad. 71. III. The vendor's lien for purchase-money. Harrison *v.* Harrison, 1 Russ. & M. 71. IV. Terms for years. Att.-Gen. *v.* Graves, Amb. 155. V. Mortgages. Att.-Gen. *v.* Meyrick, 2 Vez. 44; also Johnston *v.* Swann, 3 Mad. 457, 467. VI. Money given to exonerate land in mortmain. Corbyn *v.* French, 4 Ves. 418, 427; Waterhouse *v.* Holmes, 2 Sim.

But the king, being both a body politic and corporate, is incapable of taking by devise.

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162. VII. Money secured on turnpike tolls. Corbyn *v.* French, *ubi sup.;* Knapp *v.* Williams, 4 Vez. 430, note. And VIII. Money secured on poor and county rates. Finch *v.* Squire, 10 Ves. 41. There are the following exceptions to the operation of the above statute: I. Where the testator's direction to invest, in real estate, the money destined for a charitable purpose, is merely discretionary, and not imperative. Soresby *v.* Hollins, 1 Highmore, 174; Grimmett *v.* Grimmett, Amb. 210; Att.-Gen. *v.* Goddard, 1 Turn. & R. 348; and see Johnston *v.* Swann, *ubi sup.* II. Land or money to be invested in the purchase of land for the benefit of Queen Ann's bounty. 43 Geo. 3, c. 107; also 45 Geo. 3, c. 84, s. 3; Amb. 636; 3 Ves. 734. III. Devises and bequests for promoting the building, &c., of churches, &c. 43 Geo. 3, c. 108. IV. Devises by freemen according to the custom of *London.* 4 Bro. C. C. 409. V. Devises of real estate or money to be realized for the benefit of the two universities of *Oxford* and *Cambridge*, and the colleges of *Eton*, *Winchester*, and *Westminster.* Stat. 9 Geo. 2, c. 36, ss. 4, 5; Att.-Gen. *v.* Tancred, 1 Eden, 10; 3 Ves. 641; 1 Mer. 327. VI. Real and personal estate in *Scotland.* Stat. 9 Geo. 2, c. 36, s. 6; 1 Bro. C. C. 570; 16 Ves. 330. VII. Real estate in *Ireland.* 1 Bro. C. C. 271; 14 Ves. 537. VIII. Real estate in the West Indies and the colonies. 2 Mer. 143. IX. Money to be applied in melioration of lands in mortmain. Amb. 373, 651; 8 Ves. 186; 4 Russ. 342. X. Money to be laid out in erecting a monument. 1 Jac. R. 180. On the construction of the stat. 9 Geo. 2, c. 36, see 2 Rop. Leg. c. 19, (ed. 1828,) by the Editor of the present work.]

[1] In the United States it is understood, that every corporation, not expressly disqualified by statute, is capable of taking and holding real estate, as well by devise as by deed; corporations being deemed "persons," within the meaning of the law. The only restrictions are, that the purpose of the conveyance be not foreign to the objects for which the corporation was created; and that the value of its lands do not exceed the sum or value limited in its charter. 2 Kent, Comm. 283; *Ante*, tit. 1, § 40, note. And see Lumbard *v.* Aldrich, 8 N. Hamp. 31; Angell and Ames on Corp. ch. 5; Reynolds *v.* Starks, 5 Ham. 205; 7 Cowen R. 540; 2 Cowen, R. 664.

The only statute disqualifications which have been found, are these:—

In New York, corporations are expressly restrained from taking by devise, unless specially authorized by their charter. N. York Rev. St. Vol. II. p. 118, § 3, 3d ed.; Theol. Seminary *v.* Childs, 4 Paige, 419, 422; Wright *v.* Trustees M. E. Church, 1 Hoffm. Ch. R. 225; 4 Kent, Comm. 507.

In *Pennsylvania*, corporations cannot take lands, "without the license of the Commonwealth." Dunl. Dig. p. 567, ch. 447, § 1.

In *Florida*, *religious* societies are enabled to hold "a quantity of land not exceeding ten acres" for the purpose of erecting buildings for public worship. Thomps. Dig. p. 279.

In *Georgia*, persons desirous of having any *church*, camp-ground, academy, school, &c. (specifying divers other objects,) may receive corporate powers from the Courts; but are prohibited from holding "any property, of any kind, except such as may be *absolutely necessary* to carry into effect the object of their incorporation." Geo. Rev. St. 1845, p. 372.

In some few other States, the right of corporations to hold any property is recognized, but not beyond the limit of value expressed in their charter.

21. It is laid down by Lord Talbot, that when a person takes upon him to *devise what he has no power over*, upon a supposition that his devise will be acquiesced under, the Court of Chancery will compel the devisee, if he will take advantage of the devise, to take entirely, but not partially under it; there being a *tacit condition annexed to all devises of this nature*, that *the devisee do not disturb the disposition which the devisor has made.* (*a*)

22. A having two daughters, B and C, devised lands, whereof he was tenant in fee simple, to B, and lands of which he was only tenant in tail, to C. It was held, that if B claimed a share of the entailed lands, she must relinquish her claim to the fee simple lands devised to her: for the testator having disposed of
*17 *his whole estate amongst his children, what he gave them was upon an implied condition, that they should release to each other. (*b*)

23. A person, by articles previous to his marriage, agreed to settle lands to the use of himself and his wife for their lives, with remainder to the use of the heirs of their bodies. He afterwards made a settlement, which was not pursuant to the articles; and on the marriage of his son, settled other lands on him in the usual manner, and levied a fine of the lands comprised in the articles, to the use of himself in fee. By his will he devised part of those lands to his daughters, and the rest of his estates to his grandson. Lord Talbot held, that the grandson, being entitled to the lands comprised in the articles, should be put to his election,† whether he would take under the will, or the articles. (*c*)

24. Where a will is *void as a devise of land*, either from the incapacity of the devisor, or from its not being duly executed, and is *good as to personal estate*, the heir may however take a legacy under it, without relinquishing his right by descent; be-

(*a*) Forest, R. 82.

(*b*) Noys *v.* Mordaunt, 2 Vern. 581. Bor *v.* Bor, 3 Bro. Parl. Ca. 167. Doe *v.* Cavendish, 4 Term Rep. 741.

(*c*) Streatfield *v.* Streatfield, Forrest, 176.

[† Upon the doctrine of election as connected with testamentary dispositions of real and personal estate, see 2 Roper's Legacies, ch. 23, ed. 1828.] (See also 2 Story Eq. Jur. ch. 30, and 1 Jarm. on Wills, ch. 15, 2d ed. by Perkins, where this doctrine is very fully discussed.)

cause, as to the land, there is in fact no disposition of it, consequently no election.

25. In the case of Hearle *v.* Greenbank, the daughter, by a will made when she was only nineteen years old, gave a legacy to her heir at law, and disposed of the real estate to another person; the question was, whether, as the will was void as to the land, and good as to the legacy, the heir should have the land, and also the legacy, or be obliged to make his election. (*a*)

Lord Hardwicke declared his opinion, that the heir was not obliged to make his election, for the will was void; and when the obligation arose from the insufficiency of the execution, or invalidity of the will, there was no case where the legatee was obliged to make an election, for there was no will of the land. A man devises a legacy to his heir at law, and his land to another; the will is not well executed according to the Statute of Frauds, for the real estate; the Court would not oblige the heir at law, upon accepting the legacy, to give up the land.

26. But where the heir becomes entitled to a real estate by descent, in consequence of its having been *purchased after the * execution of his father's will*, by which interests are *18 bequeathed to him, he cannot take both, but must make his election. (*b*)

27. P. Thellusson devised several real estates to trustees, upon trust to accumulate the rents to a certain period; and directed, that in case he should enter into any contracts for the purchase of lands, and die before the conveyance thereof, such contracts should be carried into execution, and the conveyance be to his trustees, upon the trusts of this will. He also devised certain interests to his son. After the execution of his will, the testator contracted for the purchase of some real estates, and died without republishing his will. The heir claimed the lands contracted for, and also the interests given him by the will. (*c*)

Lord Erskine. — "The prayer of the bill, filed by the heir at law, with reference to this point, is, in effect, that the personal estate of the testator shall be applied to the completion of these contracts, directed by the will to be carried into execution for the benefit of the heir; and that he, in opposition to the will, may

(*a*) Tit. 32, c. 13. (*b*) *Infra*, c. 3.
(*c*) Thellusson *v.* Woodford, 13 Ves. 209. *Vide infra*, c. 20, § 58.

take as heir those estates so contracted for; and the trustees may stand seised to his use, instead of the uses of the will. I give the judgment which I find myself bound to give, with some reluctance, considering this will as dictated by feelings not altogether consistent with convenience. But this appears to me to be a case of election. The jurisdistion exercised by this Court, compelling election, may be thus described. A person shall not claim an interest under an instrument, without giving full effect to that instrument, as far as he can. If therefore a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will; that person shall not be permitted to defeat the disposition where it is in his power, and yet take under the will: the reason is, the implied condition that he shall not take both; and the consequence follows, that there must be an election: for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property, unless in the manner intended by the testator.

"This is the proposition. But it has been said, that
19 * when a *testator by his will attempts to give that which is not his property, but which he supposes to be his, forming his different dispositions upon that mistake, *non constat* what he would have done, had he been aware of the true state of the circumstances. The best answer to that was given by Lord Alvanley, in the case of Whistler *v.* Webster (*a*) — That no man shall claim any benefit under a will, without conforming, as far as he is able, and giving effect to every thing contained in it, whereby any disposition is made, showing an intention that such a thing shall take place; without reference to the circumstances, whether the testator had any knowledge of the extent of his power, or not. Nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another. It is enough to say he had such intention; and the Court will not speculate upon what he would have done in the different cases put. If the instrument is such as to indicate

(*a*) 2 Ves. 367.

what the intention was, the only question is, did he intend the property to go in such a manner; not whether he had power to do so, and would have done it, had he known he could not, without a condition imposed upon another person. Whether he thought he had the right; or, knowing the extent of his authority, intended by an arbitrary execution of power to exceed it; no person taking under the will shall disappoint it.

"In every case of election, there must be an intention to dispose of that, over which that person has no power of disposition; that is the circumstance that creates election. The testator, with this peculiar object, the application of his personal estate to the acquisition of great landed property, was not aware of the distinction between real and personal estate; and therefore conceived, that under this direction of his will as to his future contracts for purchases, his trustees would be legally seised according to the uses of his will. As he had not the power to make that disposition, the heir takes those estates that cannot pass by the will; but the testator, not being aware of that, gives considerable interests to his heir: but gives those interests under the conception that the whole property and arrangement were subject to his control; and upon that ground the principle of election must prevail.

"In Noys *v.* Mordaunt, (*a*) the testator imagined he had power over the estate which was in settlement, and the Lord Keeper *put the decision upon the implied condition. *20 That case was followed by Streatfield *v.* Streatfield, (*b*) and several cases, down to Sheddon *v.* Goodrich. (*c*) The difficulty, upon a plain simple principle, occurred in the case of Hearle *v.* Greenbank. (*d*) But I do not apprehend that this case will be embarrassed by that decision. Lord Hardwicke held, that the act of the infant had no effect; that there was no disposition as to the real estate; and therefore a case of election did not arise.

"This is the case of a man having a clear right to dispose by will, both of his real and personal estate; but his disposition fails as to these real estates, by his ignorance of the distinction, that a will of a subsequent date was necessary. There is, therefore, as in the case of Hearle *v.* Greenbank, no will that can touch these real estates. As to the case of a devise with two

(*a*) *Ante*, s. 24. (*b*) *Ante*, s. 25. (*c*) 8 Ves. 481. (*d*) *Ante*, s. 27.

witnesses only, the intention is as plain as in Noys *v.* Mordaunt: why then should not the Court say, in the former case, the intention is clear, but cannot as to the real estate have legal effect, from the omission of a third witness by mistake: as in the other case, the divisor attempts, through mistake, to devise an estate which is in settlement, or belongs to another person? The opinion of Lord Hardwicke I take to be this; a devise of real estate is considered as a matter of so much solemnity and importance, that the law will not accept proof of the act, without the evidence of three witnesses. If not so proved, it is nothing; it cannot receive notice. The intention cannot be represented; for it cannot be presumed, and there is no evidence: the will not being executed with the solemnity prescribed by the law, as to real estate, cannot be read: the Court cannot see any devise of real estate; and therefore, as the estate does not appear to be devised away from the heir, no act appearing to be done, as in this case the act does appear to be done by Mr. Thellusson, the heir cannot in that case be put to election.

"The case of Hearle *v.* Greenbank stands upon the same ground; an infant, under the statute 32 Hen. VIII., not having a right to dispose of real estate, the Court cannot look at the will. It is, from the incapacity of the person who frames it, considered as no instrument.

"These are the only instances in which the principle has been limited. It cannot be argued that it does not reach an heir at law. Lord Hardwicke would not put the case of an heir
21 * at law, * by way of illustration, if the heir could not under any circumstances be put to election. The principle of election is plain and intelligible; that if a person being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises, that the benefit under that will shall be taken upon the terms of giving effect to the whole disposition. Mr. Thellusson's heir takes these estates, as if his father had not made a will; but my opinion is, that he cannot also take what is given to him by the will. He must therefore elect." (*a*)

Upon an appeal to the House of Lords, the order was confirmed. (*b*)

28. Mr. Vesey, in a note to this case, observes, that the case of

(*a*) See also Churchman *v.* Ireland, 1 Rus. & Myl. 250, et Ib. 244. (*b*) 1 Dow, 249.

a devise to the heir, of an estate which he would have by descent, if no will was made, and to another person, of an estate of which the heir is seised in his own right, is put by Sir S. Romilly as said to be a case of election; and that Mr. Sugden had found a precise decision of the point accordingly, against the heir. Anon. Gilb. Eq. Rep. 15. And in that instance it might be observed, the heir took, not under the devise, but by his better title, descent. The devisor, however, devising the estate to him, must be conceived to be aware of his power to devise it away; and the condition was accordingly implied. (*a*)

(*a*) 9 Ves. 437. Forrester *v.* Cotton, 1 Eden, 532.

CHAP. III.

WHAT MAY BE DEVISED.

SECT. 1. *Estates in Fee Simple.*
4. *Estates for Lives.*
5. *Chattels real.*
7. *Trust Estates*
8. *Lands contracted for.*
13. *Mortgages.*
14. *Equities of Redemption.*
15. *Advowsons.*
17. *Rents.*
19. *Tithes.*
20. *Franchises.*
SECT. 23. *Contingent Estates and Interests.*
27. *Joint Tenancies not devisable.*
30. *Nor Rights of Entry.*
32. *The Devisor must be seised or entitled.*
37. *And must continue seised or entitled.*
39. *Exceptions.*
40. *Tenancies escheated.*
41. *And Terms for Years.*

SECTION 1. THE *proper subjects of a devise* are *real estate;* and the words used in the Statute of Wills are, "manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder;" which extend to every species of real property, whether corporeal or incorporeal. (*a*)[1]

2. Not only *estates in fee simple absolute*, but also *determinable fees*, and *base fees*, are devisable under these statutes; the term, *fee simple*, being taken in its most extensive sense. (*b*)

3. By the words of the statute 34 & 35 Hen. VIII. c. 5, s. 4, all persons, seised in fee simple, in coparcenary, or in common, may devise the estates which they hold in this manner. And all persons seised in fee simple, may also devise any rents, commons, or other profits, out of, or to be perceived of the same, or out of any parcel thereof. (*c*)

(*a*) (*Infra*, § 37, note.) (*b*) 3 Bulstr. 184.
(*c*) (George *v.* Green, 13 N. Hamp. 521; Osgood *v.* Breed, 12 Mass. 525.)

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[1] In *Pennsylvania*, joint-tenancies are expressly made devisable, by the Statute of Wills. In *Rhode Island*, estates tail are also included in the enumeration of devisable estates; but in *Maryland*, they are excluded. See Dunlop, Dig. ch. 542, § 1, p. 570; R. Island Rev. St. 1844, p. 231; LL. Maryl. Vol. I. p. 370.

4. The statute 34 & 35 Hen. VIII. only extends to estates in fee simple, and therefore did not enable persons to devise estates which they held *pour autre vie*. This was remedied by the * statute 29 Cha. II. c. 3, s. 12, by which it was enacted, * 23 that any estate *pour autre vie* shall be devisable by will in writing. (*a*)[1]

5. As to *chattels real*, or term for years, they might always have been disposed of by testament, because they were only considered as personal estate. But where a person acquires a term for years *as executor*, he cannot devise it; for immediately on his death it is to the use of the first testator, and his executors have it as executors of the first testator, and to his use. (*b*)

6. Whenever a *term for years* is devised, the *consent of the executor is necessary* to complete the title of the devisee. But if a term be devised to A for life, remainder to B, the assent of the executor to the devise to A will operate as an assent to the devise over to B, and vest an interest in him accordingly. (*c*)

7. As uses were the medium through which lands were originally devisable; so *trust estates*, which in fact are uses not executed by the statute, are now devisable;[2] but where a person has only an equitable interest in lands, his devise of them amounts to no more than a direction to those who have the legal estate in trust for him, to convey it according to the devise. (*d*)

8. Where *an agreement* is entered into in writing *for the purchase of lands*, and, before a conveyance of the legal estate is executed, the purchaser devises the lands so contracted for, and dies, such devise will be held good in equity: for, although, according to the strict rules of law, the devisor has not lands within the Statute of Wills, till a conveyance of the legal estate is executed;[3] yet from the time when the agreement was signed,

(*a*) Gawen *v.* Ramtes, Cro. Eliz. 804. (*b*) Bransby *v.* Grantham, Plowd. 525.
(*c*) Wentw. Ex. c. 2, 19; 10 Rep. 47, b. (*d*) Tit. 12, c. 1; 2 P. Wms. 258.

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[1] This provision has been enacted in several of the United States; and in others it is involved in the general terms of the Statutes of Wills.

[2] As to the power of a trustee to devise the trust estate, see *ante*, tit. 12, ch. 2, § 9, note; 4 Kent, Comm. 538, 439; 2 Jarm. on Wills, 714–718, Perkins's ed.

[3] Equitable, contingent, and reversionary interests, and possibilities coupled with an interest, are generally devisable in the United States, under the general language of the Statute of Wills, in most of the States. See *infra*, § 37, note; 4 Kent, Comm. 512, 513. Thus, in *Maryland*, an equitable interest has been held devisable. Carroll *v.* Norwood, 5 H. & J. 162. So, a possibility of a legacy's vesting. Spence *v.*

the vendor is considered to be seised only in trust for the purchaser, who in equity is deemed the real owner of the lands, and therefore is allowed to devise them. [The will cannot of course operate so as to pass the legal estate, which will either descend to the heir at law of the vendor, or pass under a general devise of his trust estates.] (*a*)

9. Where an agreement for the purchase of land is not to be carried into execution till a future day, and before that day the purchaser makes his will, the lands so agreed for pass by such will.

10. By articles, dated in April, 1706, it was agreed between the vendors, and the agent of the purchaser, that the possession of the lands, agreed to be purchased, should be delivered at the Michaelmas following, and proper conveyances executed;
24 * and * the agent covenanted that the purchase-money should be paid, when possession was delivered. In June following, the purchaser made his will; and the question was, whether these lands passed by it. (*b*)

Lord Cowper decreed that they did; and upon an appeal to Lord Keeper Harcourt, it was argued by Sir Joseph Jekyll and Mr. Howe, that this decree ought to be reversed. They took a distinction between an agreement for the immediate purchase of lands, and such an agreement for the future purchase thereof, as this was; they agreed, that if the articles had been for the present purchase of the lands, the vendor would immediately have become a trustee for the purchaser; and then a devise of them would have been good in equity; but here the possession was not to be delivered till Michaelmas following, nor was any money to be paid before that time; and then the purchaser had no power to devise them sooner.

(*a*) Cha. Ca. 39. 9 Mod. 78. (Livingston *v.* Newkirk, 3 Johns. Ch. 312, 316.)

(*b*) Greenhill *v.* Greenhill, Prec. in Cha. 320. (M'Kinnon *v.* Thompson, 3 Johns. Ch. 307, 310.)

Robins, 6 G. & J. 507. So, in *New Jersey*. Den *v.* Manners, 1 Spencer, 142. [So in *South Carolina*. Schmidt *v.* Schmidt, 7 Rich. Eq. 201.] In *Massachusetts*, a reversionary and contingent interest; Austin *v.* Cambridgeport, 2 Pick. 215; though expectant on the determination of an estate tail. Steel *v.* Cook, 1 Met. 281. In *New York*, a power to sell lands, coupled with an interest. Wright *v.* Trustees M. E. Church, 1 Hoffm. 204. In *Delaware*, the interest of a devisee, expectant after an executory devise. Kean *v.* Roe, 2 Harringt. 103.

On the other side it was said, in support of the decree, that these lands were bound, immediately from the execution of the articles; that the possession not being to be delivered till a future time, made no difference in equity; that if the purchaser had died before Michaelmas, the equity would have descended to the heir; and he might have brought a bill against the executors to compel the payment of the purchase-money out of the personal estate.

Lord Keeper Harcourt said he saw no reason to vary the decree; he thought that such future interest was devisable, as well as if it had been in possession; that the lands and money were mutually bound by the articles; and affirmed the decree.

11. Even *a parol agreement for the purchase of lands*, which is admitted, so as to be binding on the parties, notwithstanding the Statute of Frauds, will vest such an interest in the purchaser, as he may devise by will. (*a*)

12. In the year 1743, a parol agreement was made between Mr. Brown, as agent for Mrs. Hughes, and Messrs. Potter and Westley, as agents for the archbishop of Canterbury, for the purchase of an estate in the Isle of Wight. The plan and particulars of the estate were delivered to Westley, and on the 7th June, 1744, the parties met; a price was fixed, and it was agreed by parol, that the purchase should be completed the
* Christmas following. In July, 1744, the title-deeds were *25
delivered to Westley to abstract, and deliver to the purchaser's counsel, which was done in April, 1745. The further proceeding was interrupted by a claim of one Huxley to part of the estate; a bill was filed, and it was referred to the master to inquire into the contract, who reported, in February, 1746, that it was a beneficial one; and the next day Westley received instructions from the archbishop to draw the conveyances, which he did, and which were approved of on behalf of the archbishop; on the 17th September, 1746, they were carried to the archbishop, who returned them to be engrossed, and they were actually engrossed in his lifetime, but were not executed, as intended. (*b*)

The archbishop had made his will in 1745, and on the 10th

(*a*) Tit. 32, c. 3.
(*b*) Potter *v.* Potter, 1 Vez. 274, 437. Langford *v.* Pitt, (2 P. Wms. 629, *infra*, § 38.)

April, 1747, long after this agreement, be made a codicil, ratifying and confirming his will; and the question was, whether the estate, thus agreed for, should pass by his will and codicil. (*a*)

The Master of the Rolls (Sir J. Strange) said, one circumstance was wanting; the reducing the agreement into writing, according to the Statute of Frauds; which if done in 1744, the estate would certainly be considered as the archbishop's, in equity, from that time. But though an agreement was not reduced into writing, and signed by the party, yet it was well known that if confessed, or in part carried into execution, it would be binding on the parties, and here was the fullest admission thereof. And as the will was republished by the codicil, it would pass this estate. (*b*)

13. If a *mortgagee devises the lands mortgaged, before the condition is broken*, it will be void (as a devise of the lands); because a condition is not devisable. But an estate in mortgage may be *devised after the condition is broken;* and in such a case, if the devisee exhibits his bill against the mortgagor, to foreclose him, a decree will be made accordingly. (*c*) [1]

14. An *equity of redemption*, being in some respects similar to a trust estate, has always been considered as devisable. And in 12 Cha. II. it was determined by the Court of Chancery, that where a person seised in fee had mortgaged his estate, and afterwards devised it, the equity of redemption should go to the devisee, not to the heir. (*d*)

26* * 15. An *advowson appendant* to a manor will of course pass by a devise of the manor. An *advowson in gross* being an hereditament, is also devisable under the Statute of Wills; and the next or any number of presentations may also be devised; in which case, the devisee may either present himself, or any other person. (*e*)

16. Where the incumbent of a church had the inheritance of the advowson in him, and devised the next presentation, it was held good: for though the will had no effect till the death of

(*a*) Cave *v.* Cave, 2 Eden, 139. (*b*) 7 Ves. 274. 10 Ves. 605. 12 Ves. 107.
(*c*) Tit 15, c, 2. (*d*) Tit. 15, c. 3. Philips *v.* Hele, 1 Cha. R. 101.
(*e*) Tit. 21. Cleer *v.* Peacock, Cro. Eliz. 359. Law *v.* Epis Lincoln, 2 Black. R. 1240.

[1] The legal estate is not devisable by the mortgagee, until foreclosure. *Infra*, ch. 10, § 135.

the devisor, yet it had an inception in his lifetime, and that made it good. (*a*)

17. A *rent charge* is devisable, by the words of the statute 34 & 35 Hen. VIII.; but it was formerly doubted, whether a rent charge *in esse*, issuing out of gavelkind lands, and having commenced within time of memory, was within the custom of devising; nor was it settled to be so, till the time of Lord Hale. (*b*)

18. As to a *rent service*, it of course followed the nature of the reversion or seigniory to which it was incident; nor was there any doubt as to the custom of gavelkind extending to other rents, if they had existed immemorially. (*c*)

19. *Tithes impropriate* in lay hands are comprehended under the general word *hereditaments*, in the Statute of Wills, and are therefore devisable. (*d*)

20. Lord Coke says, that *hereditaments*, which are not of any yearly value, cannot be devised; and therefore, if the King grants *bona et catalla felonum*, waifs, estrays, or any other kind of franchises which are not of an annual value, they are not devisable. But that franchises of a certain value, and not restrained to the person of the grantee and his heirs, may be devised. (*e*)

21. *Franchises*, though not of an annual value, will, however, pass by a devise, as appurtenant to other things of an annual value.

22. Thus, in Butler and Baker's case it is said, if a man, seised of a manor, to which court-leet, waif, estray, or any other hereditament which is not of any annual value is appendant, or appurtenant, devises the manor with the appurtenances, these shall pass as incidents to the manor. (*f*)

23. An opinion formerly prevailed, that neither contingent remainders, nor any other *contingent estates*, or interests in land, * could pass by a will made previous to their vesting; * 27 but in the following cases they have been held to be devisable. (*g*)[1]

(*a*) Penchyn *v.* Harris, Cro. Jac. 371.
(*b*) 1 Inst. 111, a, n. 5. 1 Mod. 112. Rob. Gav. 79. (*c*) Idem. (*d*) Tit. 22.
(*e*) 1 Inst. 111, b. 3 Rep. 32, *b*. (*f*) 3 Rep. 32, b.
(*g*) Fearne, Cont. Rem. 547. Ed. 8.

[1] See, accordingly, *supra*, § 8, note, and cases there cited. Shelby *v.* Shelby, 6 Dana, 60; Cruger *v.* Hayward, 2 Desau. 422.

24. John Selwyn being tenant for life, with remainder to his son John in tail; the father and son joined in a deed of bargain and sale, dated 20th April, 1751, to make a tenant to the *præcipe*, for the purpose of suffering a common recovery; the uses of which were declared to be to the father for life, remainder to his son in fee. Trinity term began that year on the 7th of June, and on the 8th, John, the son, made his will, whereby he disposed of all his real estates; in the same term a writ of entry was sued out, returnable *quinden. trin.*, which was the 17th June, and the recovery was completed the said term. John Selwyn, the testator, died soon after the return of the writ of entry; and the question was, whether the lands comprised in the recovery passed by the will, it having been made before the return-day of the writ of entry. (*a*)

It was contended, that the testator had only a future executory use, at the time of making his will, not a present use; for the statute could not draw the estate to the use, till the possibility, that is, the completion of the recovery, had actually happened; and that this future executory use was not devisable.

The Court of King's Bench certified their opinion to the Court of Chancery, that the lands passed by the will; and Lord Mansfield, in a subsequent case, is reported to have said, that if the practice of the Court allowed him to give his reasons, he was prepared to have shown, with the concurrence of his brethren, that *all contingent, springing, and executory uses, where the person who was to take was certain,*† so that the same might be descendible, *were devisable.* (*b*)

25. The doctrine laid down by Lord Mansfield, has been fully confirmed in the two following cases.

Sir James Grubb devised all his real estates, in trust for his son James; and if he should die without issue, under age, then

(*a*) Selwyn *v.* Selwyn, 2 Burr. 1131. 1 Black. R. 222, 251. (*b*) 1 Black. R. 606.

[† But where the *person is uncertain*, the estate cannot be devised while the uncertainty continues. Thus if lands are given to the survivor of two or more persons in fee, or to two or more for life, with a power for the survivor to dispose of the lands by will; such expectancy cannot be devised by a will made by the one (in the lifetime of the others) who may happen to become the survivor; for until the survivor is ascertained, by the death of his companions, the person, and not the estate is in contingency. Doe *v.* Tomkinson, 2 Mau. & Sel. 165; 2 Pres. Con. 270.]

that all his estates should go to Cochran, his heirs and assigns. *Cochran devised all the estates whereof he was *28
seised in possession, remainder, or reversion, to the plaintiff, and died in the lifetime of James Grubb, the son; who afterwards died under age, and without issue. (*a*)

On a bill brought by the devisee of Cochran, a question was made, whether the possibility, given to Cochran, was devisable.

Lord Northington.—"I never had any doubts, since I was twenty-five years old, but that these contingent interests were devisable, notwithstanding some old authorities to the contrary. I sent the question, however, into the King's Bench, in the case of Selwyn *v.* Selwyn, for the satisfaction of the parties; and the certificate of the Judges implies, I think, that they agreed with me in this opinion." Upon which the Solicitor-General, De Grey, and Mr. Skinner, waived all further argument on the other side; and Lord Northington added,—"This argument is properly withdrawn, as the point is settled, and ought not to be shaken. It is a liberal and right determination."

26. A testator devised his dwelling-house, &c., to his brother, T. L., till his (T. L.'s) youngest son, I., or any other of his younger sons, should attain the age of twenty-one years. And in case he should have no younger son who should attain that age, but only one son that should attain it, then till such only son should attain that age. And when his said nephew I., or any other of the younger sons of the said T. L., should attain the age of twenty-one years, then he gave his said dwelling-houses, &c., unto his said nephew I., or unto such other son as for the time being should be a younger son of his said brother T. L., and should first attain his age of twenty-one years, and to the heirs and assigns of such younger son forever; [but if his said brother, T. L., should have but one son that should live to attain the said age, then the testator gave the same to such only son, his heirs and assigns, forever.] The testator left his said brother his heir at law, and T. and the said I., the sons, and only issue of his said brother. I. died under twenty-one years of age; and afterwards T., in the lifetime of his father, T. L., made his will, and devised "all his worldly estate, of what nature or kind soever, whether in possession, remainder, or reversion, that he

(*a*) Moor *v.* Hawkins, 1 H. Black. R. 33. 2 Eden, 342.

should die seised or possessed of, interested in, or entitled to, invested in, or should belong to him at his decease, where-
29* *soever or howsoever, in any manner or wise," unto his wife in fee. (*a*)

Upon this case three questions arose. First, whether there was a vested interest in T.; secondly, whether if it was contingent, it was devisable; and thirdly, whether it passed by the will.

Lord Loughborough said, the discussion of the first question was unnecessary; for taking it to be a springing contingent executory use in T., they were all of opinion that it was devisable, and passed by his will.

Upon a writ of error in the Court of King's Bench, the decision of the Court of Common Pleas was confirmed; and Lord Kenyon observed, that the statute for enabling persons *having* any manors, lands, &c., to devise, must mean, having an interest in the lands. He distinguished between such a contingent interest and a *mere possibility*, like that which an heir has from his ancestor; which was nothing more than the *hope* of a succession, and was not subject to disposition; and he hoped that the point would be considered to be fully at rest. (*b*)

Ashhurst, J., said, the plain meaning of the statute was, that every person who had a valuable interest in lands, should have the power of disposing of it by will.

Buller, J., observed, that if it was such an interest as was descendible, it seemed strange to say, it was not also devisable; that they must both be governed by the same principle; and that it was a sound distinction which had been taken by the Chief Justice, between a bare possibility, and a possibility accompanied with an interest.

Grose, J., remarked, that the 4th section of 34 & 35 Hen. VIII. c. 5, which was explanatory of 32 Hen. VIII. c. 1, declared, that all persons, having a sole estate or interest in lands, &c., might devise; which did not include a bare possibility or hope of succession, but a possibility accompanied with an interest. (*c*)

27. Littleton says, if there be two *joint tenants in fee* of lands

(*a*) Roe *v.* Jones, 1 Hen. Black. Rep. 30, cited 17 Ves. 182.
(*b*) Jones *v.* Perry, 3 Term Rep. 88.
(*c*) Perry *v.* Phelips, 1 Ves. 251. Scawen *v.* Blunt, 7 Ves. 300.

devisable by custom, and one of them devises his share, it is void; because no devise can take effect till after the death of the devisor; and by that event the lands become immediately vested in the other joint tenant, by survivorship. (*a*) [1]

28. In conformity with this principle, the statute 34 & 35 Hen. VIII. only enables persons, having a sole estate in fee simple, * or seised in fee simple, in coparcenary or in com- *30 mon, to devise, which excludes estates held in joint tenancy. And in Butler and Baker's case, (*b*) in 33 & 34 Eliz. it was laid down, that the law only considers what estate the devisor had at the time of making his will, without regard to any subsequent event; from which it follows, and has been settled, that a devise by a joint tenant, who afterwards severs the joint tenancy, is void; because the devisor was joint tenant when he made his will.

29. Richard Gilbert and Frances Sophia Gilbert were seised of the premises in question, as joint tenants in fee. Richard Gilbert, on the 20th January, 1754, made his will, and thereby devised in these words: "*Imprimis*, I give and bequeath all my part, right, title, and interest, which I have in an estate jointly with my sister Frances Sophia Gilbert, to my wife Jane." Afterwards, by indentures of lease and release, Richard Gilbert and his sister made a partition, and severed the joint tenancy: and the estate in question was conveyed to Richard in fee. The question was, whether the will was good as to this estate. (*c*)

The Court was clearly and unanimously of opinion, that a will, made by a joint tenant, during the continuance of the jointure, was not a good will, even as to a share of his estate, under the Statute of Wills, notwithstanding a subsequent severance of the joint tenancy, by a partition, unless there was a republication of it after the partition.

30. Where there is a tenant for life, with a vested remainder,

(*a*) Tit. 18, c. 2. (*b*) 3 Rep. 25. Poph. 87.
(*c*) Swift *v.* Roberts, 3 Burr. 1488. 1 Black. R. 476.

[1] In the United States, the general rule is, that all estates, vested in two or more persons, are to be deemed tenancies in common, unless a different tenure is apparent in the instrument; and in many of the States, the right of survivorship is expressly abolished. In others, it has never been recognized. See tit. 18, ch. 1, § 2, note. Joint tenancies, therefore, are generally devisable.

or a reversion immediately expectant thereon, in another person, and such tenant for life levies a fine, it devests the remainder or reversion, and turns it to a right, leaving only in the remainderman or reversioner *a mere right of entry* which is *not devisable.*[1]

31. Thus in the case of Goodright *v.* Forrester, (*a*) Lord Ellenborough said, the second question was, whether a right of entry was devisable; and the Court was of opinion that it was not devisable, for such right was certainly not assignable by the common law, nor did it fall within the words of the statute 32 Hen. VIII. c. 1, which were, "having manors, lands, tenements, or hereditaments;" nor of the statute 34 & 35 Hen. VIII. c. 5, s. 4, which were, "having a sole estate or interest in fee simple of and in any manors, &c. in possession, reversion, or remainder."

In Corbet's case, 1 Rep. 85 *b*, "For the construction of
31 * wills * this rule was taken by the Justices in their arguments, that such an estate, which cannot by the rules of the common law be conveyed, by act executed in his life, by advice of counsel learned in the law, such estate cannot be devised by the will of a man who is intended by law to be *inops consilii.*" From whence it might be inferred, that out of that interest, in which by act executed in a man's life, it was not possible to create any estate, no estate could be created by his will. And in Butler and Baker's case, 3 Rep. 32 *a*, it is said: "Without question, that which a man cannot dispose of by any act in his life, shall not be taken for any of his manors, &c. whereof he may devise two parts, by authority given him by the statute." And in Lord Mountjoy's case, Godb. 17, it was laid down, "that the Statute of Wills, 32 Hen. VIII. that it shall be lawful, &c. to devise two parts, &c., respects only such things as are devisable; but a right of entry was not devisable, and therefore, according to the terms of the statute, and the authority of that case, was not devisable. For these reasons, the Court was of opinion that there must be a judgment for the defendant. And whatever mischief or hardship might attend the decision of this case, or might be expected to arise from the application of the same rule

(*a*) (8 East, 552, 567.)

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[1] In the United States, rights of entry are almost if not quite universally devisable. See *infra*, § 37, note; *Supra*, § 8, note.

to other cases, it was an inconvenience which could only be remedied by positive law; and the propriety of applying such a remedy, whereby the same rights of entry and action which belong to the heir, might be extended to the devisee, was a question particularly fit for the consideration of the legislature." (*a*) †

32. When the feudal doctrine of non-alienation began to subside, and some persons were allowed to dispose of their lands by will, a devise was considered to be in the nature of an appointment to uses. The courts of law, therefore, held that a *devise affecting lands could operate on those only of which the testator was possessed at the time of executing his will;* and not on any lands acquired afterwards. (*b*) [1]

33. The *statutes of Wills adopt the same principle*, the words

(*a*) 8 Vin. 61, pl. 21. (*b*) Cowp. R. 305.

[† A writ of error was brought in the Exchequer Chamber, but judgment was given on another point. 1 Taunton's Rep. 578.]

[1] Though, as to *personal* estate, the law of England adopted the rule of the Roman law, by which a testament speaks from the time of the testator's death; yet a devise of *lands* is considered in a different light from a Roman will, which was the institution of an heir. A *devise* is an appointment of particular lands to a particular devisee, and is considered in the nature of *a conveyance by way of appointment;* and it is upon this principle, that no man can devise lands, which he had not at the date of such conveyance. It does not turn upon the construction of the statute of 27 H. 8, which says that, "any person *having* lands," may devise them; for the same rule existed before the passing of the statute, in regard to lands then devisable by custom. Harwood *v.* Goodright, Cowp. 90, per Ld. Mansfield. And see acc. Brydges *v.* Duchess of Chandos, 4 Ves. 427, per Ld. Loughborough; McKinnon *v.* Thompson, 7 Johns. Ch. 307; Smith *v.* Edrington, 8 Cranch, 66; Brewster *v.* McCall, 15 Conn. 289, 290.

This rule, as to the operation of the will in regard to the *lands devised*, refers to the time of the *actual execution* of the will, which is presumed to be the day of the date, unless the contrary appears. But in regard to *points of construction*, the effect would sometimes, perhaps generally, depend on the date, or time of *apparent* execution. See 1 Jarm. on Wills, [277] note. The question, from what period a will speaks, is fully discussed by Mr. Jarman in the same work, Vol. I. ch. 2, *per tot.*

By stat. 7 W. 4, & 1 Vict. c. 26, § 3, 24, after-acquired lands pass by the will; and the will is made to speak or relate from the moment before the death of the testator, unless a contrary intention shall appear by the will.

After-acquired lands also pass by the will, if such was the intent of the testator, by the statutes of most of the United States. But such intent must clearly appear on the face of the will, by the statutes of *Maine*, *Massachusetts*, *New Hampshire*, *New York*, *Virginia*, *Ohio*, *Michigan*, and *Kentucky*. It is inferred, from the general terms of a devise of all his estate, by the statutes of *Pennsylvania*, and *Indiana;* and also of *Connecticut*, unless apparently otherwise intended. In *Vermont*, the intent must appear in the will, or be found "by a proper construction." In *Rhode Island*, the

being, "all and every person and persons *having* manors, &c., or *having* a sole estate," &c.; from which it follows that the devisor must have the estate at the time of making his will, for he cannot devise what he has not in him, then. And in Butler and *Baker's case, the Judges, commenting on the word *having*, in the statutes of Wills, say,—If it be asked *quis potest legare;* the makers of the act answer, every person *having* manors, &c.; not every person generally. (*a*)

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34. A person devised all such sums of money, lands, tenements, goods, chattels, and estates whatsoever, wherewith, at the time of his decease, he should be possessed or invested, to his wife. Nine years after, the testator received a sum of money in right of his wife, which he laid out in the purchase of an estate in Kent, of the nature of gavelkind, and died without having republished his will. The heir at law of the testator entered, and his widow brought an ejectment to recover the possession. The jury found a special verdict, stating the above facts; and

(*a*) 3 Rep. 30 b. Brewster *v.* M'Call, 15 Conn. 289, 290.)

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lands pass, if such intent "appears by the express terms of his will." In *Illinois* and *Mississippi*, the statutes empower the testator to devise all the estate which he has "or may have at the time of his death;" which seems imperatively to include after-acquired lands, if not excluded by the terms of the will. See Maine Rev. St. 1840, ch. 92, § 13; Mass. Rev. St. 1836, ch. 62, § 3; Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterstone, Ibid. 262; Winchester *v.* Forster, 3 Cush. 366; New Hamp. Rev. St. 1842, ch. 156, § 2; [Loveren *v.* Lamprey, 2 Foster, (N. H.) 434;] Verm. Rev. St. 1839, ch. 45, § 2; R. Isl. Rev. St. 1844, p. 231; Conn. Rev. St. 1849, tit. 14, ch. 1, § 4; Brewster *v.* McCall, 15 Conn. 290; N. York Rev. St. Vol. II. p. 119; [Green *v.* Dikeman, 18 Barb. (N. Y.) 535; Ellison *v.* Miller, 11 Ib. 332;] Dunlop's Dig. LL. Pa. p. 572; Tate's Dig. LL. Va. p. 889; 1 Wash. 75; 8 Cranch, 69, 70; Ohio Rev. St. 1841, ch. 129, § 48; Mich. Rev. St. 1846, ch. 68, § 3; LL. Ky. Vol. II. p. 1537, § 1; Roberts *v.* Elliot, 3 Monr. 396; Robertson *v.* Barber, 6 Monr. 524; [Ross *v.* Ross, 12 B. Monr. 437;] Ind. Rev. St. 1843, ch. 30, § 4; Ill. Rev. St. 1839, p. 686, § 1; Mis. Rev. St. 1840, ch. 36, § 2. See also Allen *v.* Harrison, 3 Call, 289; Walton *v.* Walton, 7 J. J. Marsh. 58; Denis *v.* Warder, 3 B. Monr. 173; Smith *v.* Jones, 4 Ohio R. 115; Willis *v.* Watson, 4 Scam. 64; 4 Kent, Comm. 511–513.

In the absence of any statute, lands purchased after the date of a devise will pass by a codicil made after their purchase; the codicil containing no expressions limiting the effect of the devise to lands comprised in the will. Yarnold *v.* Wallis, 4 Y. & C. 160. And see Bridge *v.* Yates, 14 Law Journ. N. S. 426.

[In *Maryland*, after acquired lands pass, "unless a contrary intention shall appear by the will." St. 1849, ch. 229, § 1; Kemp *v.* McPherson, 7 Harr. & Johns. 320; Carroll *v.* Carroll, 16 How. U. S. 275.]

that by the custom of gavelkind any tenant, being seised of lands in fee, might devise the same by will in writing. (*a*)

The Court was of opinion, that the lands did not pass; and Lord Holt said, the lands purchased after the execution of the will did not pass by it, because the law of England was plain as to this point, by all the precedents; and the law was the same of lands devised by custom, as of lands devised by statute; and whenever a will was pleaded, it was always said that the testator was seised in a fee, and being so seised made his will; which plainly showed, that it was absolutely necessary he should be seised in fee at the time of making his will.

Upon a writ of error in the House of Lords, this judgment was affirmed. (*b*) †

*35. It has been stated, that *lands contracted for* may be devised; there must, however, be *express articles*, or a positive agreement, *binding within the Statute of Frauds*, for the purchase of an estate, entered into and completed before the execution of the will; otherwise such estate will not pass by it. (*c*) *33

36. Mr. Langford entered into articles with Governor Pitt, for the sale of lands in Cornwall. Long before the execution of the articles, Governor Pitt made his will; and the question was, whether the lands, comprised in the articles, passed by the will; and it was held that they did not. (*d*)

37. The devisor must not only be *actually seised*, or *well entitled* to the lands, *at the time of making his will*, but *must also continue to be so seised or entitled till the time of his death;*[1] for,

(*a*) Brunker *v.* Cook, 11 Mod. 121. 1 Salk. 237.
(*b*) 3 Bro. Parl. Ca. 19. (*c*) (*Supra*, § 8.)
(*d*) Langford *v.* Pitt, 2 P. Wms. 629. 11 Ves. 550.

[† Upon the same principle it is conceived, lands allotted under enclosure acts in lieu of rights of common appurtenant to the lands devised, will not pass by a prior will; since the testator had not, at the date of his will, seisin of the allotment; nor can a devise of the lands (in respect of which the allotment was made,) with the appurtenances be considered an indication of intention to pass the allotment which the testator had not at the date of the will. 2 Cases and Op. 309.

To obviate this difficulty, it is a general practice to insert a clause in local enclosure acts, providing that the allotted and exchanged lands shall pass by wills made prior to the allotments, as a substitution for, and in addition to, the lands given by the will; but no provision for that purpose is contained in the general enclosure act. 41 Geo. 3, c. 109; Prest. Abst. 161.]

[1] The English rule, requiring the testator to be seised of the lands devised, at the time

in the case of a devise of a legal estate, the will cannot take effect unless the devisor dies seised; so that if a person devises his lands, and is afterwards disseised, and dies before entry, the devise is void; but if the devisor reënters, the devise becomes again valid, according to the opinion of Lord Holt; because when a man is disseised, and reënters, the disseisin is purged, and the disseisee is considered as never having been out of possession. (*a*)

38. In the case of lands contracted for, or a trust estate, the equitable right must continue undisturbed. And where the devise is of an estate in remainder or reversion, it must not be devested or turned to a right, as has been already stated. (*b*)

39. There are a few cases, in which it has been held,
34* that a *devise should operate upon property of which the devisor was not possessed at the time of making his will.

40. Thus, where a person devised his manor of A., and subsequent to the execution of his will, but before his decease, a *tenancy escheated;* it was admitted that the land comprised in the tenancy would pass to the devisee. (*c*)

41. A *term for years, purchased by a testator after the execution*

(*a*) 11 Mod. 128. Holt's R. 748. Bro. Ab. tit. Devise, pl. 15. 4 Burr. R. 1961. 8 Ves 282. (*b*) *Ante*, s. 30. (*c*) 1 Salk. 238. 11 Mad. 129.

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of making his will, and to continue seised until his death, though generally prevalent in the United States before the Revolution, has subsequently been very much relaxed; and probably is now recognized in but few States in the Union. In the statutes of all of them, except *Rhode Island*, *Georgia*, and *Alabama*, no language has been found by the editor, which seemed necessarily to require such seisin. On the contrary, by the statutes of *Maine*, *Massachusetts*, *New Hampshire*, and *Vermont*, the owner is expressly enabled to devise lands, of which he was at the time disseised; and in the other States, the general language of the statutes of Wills, by which the owners are authorized to devise "all their real and personal estate;" "any estates;" "all their lands, tenements, and hereditaments;" "all their interest in any lands, tenements," &c.; "all his estate;" "any right or title to real property;" "every estate or interest descendible to heirs;" &c., has been in some instances adjudged, and doubtless would generally be held, to render valid a devise of a mere right of entry, or of any other interest remaining in the testator. See 4 Kent, Comm. 512, 513; 3 Lomax, Dig. p. 20; Watts *v.* Cole, 2 Leigh, R. 664; Humes *v.* M'Farlane, 4 S. & R. 435; Varick *v.* Jackson, 2 Wend. 166, 202; 7 Cowen, 238, S. C.; Turpin *v.* Turpin, 1 Wash. 75; Stoever *v.* Whitman, 6 Binn. 416. But see Brewster *v.* McCall, 15 Conn. 289, 290; *Supra*, s. 8, note; 1 Jarman on Wills, by Perkins, p. 84, note (1); Austin *v.* Cambridgeport, 21 Pick. 215.

of his will, passes by it; because it is only a chattel real; and the will in this case operates as a testament, and not as a devise, either by the custom, or by the statutes of Wills. (*a*)

(*a*) 1 P. Wms. 575. 3 Atk. 176.

CHAP. IV.

DEVISES OF COPYHOLDS.[1]

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[1] This chapter, treating of a tenure not known in American law, is omitted in this edition.

CHAP. V.

SOLEMNITIES NECESSARY TO A DEVISE.

SECT. 1. *Statute of Frauds.*
2. *What is required by this Statute.*
3. *Writing.*
7. *Signing.*
14. *Attestation by Witnesses.*
21. *Who ought to see the whole Will.*
23. *And must attest in the presence of the Testator.*
32. *But may attest at different Times.*
36. *Wills and Codicils need not be separately attested.*
44. *Who may be Witnesses.*
50. *Publication.*
SECT. 53. *A Person cannot empower himself to give Lands by Will not duly attested.*
55. *Wills charging Lands are within the Statute.*
56. *But not Codicils giving Legacies.*
61. *Devises of Trust Estates are within the Statute.*
63. *And also of Mortgages and Equities of Redemption.*
65. *But not Terms for Years.*
67. *Except Terms attendant on the Inheritance.*
69. *Wills made abroad within the Statute.*
70. *A Devise of Lands may be proved in Chancery.*

SECTION 1. As the *Statute of Wills* did not require any precise form or ceremony, in a devise of lands, but only that it should be *in writing;* and as lands, devisable by custom, would pass by a will made by parol only, an infinite number of frauds were thereby committed.[1] To remedy these, it was enacted by

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[1] In all the United States, the formal execution of Wills is regulated by statute; but the requisites, though uniform in their principal features, are not alike in every particular. It is universally necessary that a will of lands should be *in writing;* and the *attestation of witnesses*, where the will is not wholly in the testator's handwriting, is everywhere required; except in *Pennsylvania;* in which State, though the execution of the will must be proved by two witnesses, it is not necessary that it be *attested* by their signatures.

It is generally indifferent, whether the will be signed by the party himself, or by another person in his presence and by his express direction, irrespective of the cause

the statute 29 Cha. II. c. 3, s. 5, usually called the *Statute of Frauds*, "That all devises and bequests of any lands or tene-

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of such delegation of authority. But it is required by the statute of *Pennsylvania*, that the will be in all cases signed by the testator himself, unless "he shall be prevented by the extremity of his last sickness;" in which case the necessity for signing by the hand of another must be proved by two witnesses, and the act be shown to have been done by his express direction. 8 Watts & Serg. 25; 5 Barr, 21, 441; Stricker *v.* Groves, 5 Whart. 386. In *Arkansas*, if the will is signed by the hand of another, in the testator's name and at his request, the person so doing must be one of the attesting witnesses, and must state that fact in the attestation.

There is, however, a diversity in the requisite *number* of attesting witnesses; *three* being required by the laws of *Maine*, *Massachusetts*, *New Hampshire*, *Vermont*, *Rhode Island*, *Connecticut*, *New Jersey*, *Maryland*, *South Carolina*, *Georgia*, *Florida*, *Mississippi*, and *Alabama*; while *two* are sufficient in *New York*, *Delaware*, *Virginia*, *North Carolina*, *Ohio*, *Michigan*, *Kentucky*, *Tennessee*, *Indiana*, *Illinois*, *Missouri*, *Wisconsin*, and *Arkansas*. But where the will is a *holograph*, that is, as expressed in some of the statutes, written wholly by the testator, subscribing witnesses are in several States entirely dispensed with. Such is the law in *Virginia*, *North Carolina*, *Kentucky*, *Tennessee*, *Mississippi*, and *Arkansas*. But in such case, in the last mentioned State, the handwriting of the testator must be proved by three witnesses. In *North Carolina*, and *Tennessee* also, the same proof is requisite; and it is further required in these two States, that the will be found among the valuable papers of the testator, or in the hands of some third person, with whom he lodged it for safe keeping. [See Outlaw *v.* Hurdle, 1 Jones Law, (N. C.) 150; Wooster *v.* Wooster, 4 Rich. S. C. 409.]

In regard to the witnesses *signing in the testator's presence*, there is also a diversity; this condition, though required in most of the States, not being found in the laws of *Arkansas*, *New York*, or *New Jersey*. In *Vermont* alone, the witnesses must also sign in the presence of *each other*.

A *seal* is not now required to a valid will, in any State, though formerly it was requisite in some States.

The *place of the signatures* of the testator and witnesses is designated in the statutes of *Pennsylvania* and *Ohio*, where the will is required to be "signed at the end thereof by the *party* making the same;" and *New York* and *Arkansas*, where the signatures, both of the *testator* and the *witnesses*, must be at the end of the will. See *infra*, § 9, note.

See Maine Rev. St. 1840, ch. 92, § 2; Mass. Rev. St. 1836, ch. 62, § 6; N. Hamp. Rev. St. 1842, ch. 156, § 6; Vermont Rev. St. 1839, ch. 45, § 6; [Adams *v.* Field, 21 Vt. (6 Washb.) 256]; R. Isl. Rev. St. 1844, p. 231; [Christopher Fry's Will, 2 R. I. 88;] Conn. Rev. St. 1849, tit. 14, ch. 1, § 2; N. York Rev. St. Vol. II. p. 124, 3d ed.; N. Jersey Rev. St. 1846, tit. 22, ch. 3, § 2; Dunlop's Dig. LL. Pa. p. 571, 572; Del. Rev. St. 1829, p. 556; LL. Maryl. Vol. I. ch. 101, sub ch. 1, § 4; Tate's Dig. LL. Va. p. 889; N. Car. Rev. St. 1836, Vol. I. ch. 122, § 1; LL. S. Car. Vol. V. p. 106; Hotchkiss's Dig. LL. Pa. p. 455; [Barr *v.* Graybill, 13 Penn. State R. (1 Harris,) 396;] Thompson's Dig. LL. Flor. p. 192; Ohio Rev. St. 1841, ch. 129, § 2; Mich. Rev. St. 1846, ch. 68, § 5; LL. Ky. Vol. II. p. 1537, Stat. 1797, § 1; Tenn. Rev. St. 1836, p. 706, 707; Ind. Rev. St. 1843, ch. 30, § 28; Ill. Rev. St. 1839, p. 686, Stat. Jan. 23, 1829, § 2; Misso. Rev. St. 1845, ch. 185, § 4; Missi. Rev. St. 1840, ch. 36, § 2; Ark. Rev. St. 1837, ch. 157, § 4, 5; Ala. Toulm. Dig. p. 883, § 2.

ments,† devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and * signed by the party so devising the same, * 47 or by some other person in his presence, and by his express directions; and shall be *attested* and subscribed *in the presence of the said devisor*, by *three or four credible witnesses;* or else they shall be utterly void, and of none effect."[1]

2. In consequence of this statute, the following circumstances are now absolutely necessary to the validity of a devise. I. That it be *written.* II. That it be *signed by the party* himself, or by some other in his presence, and by his express directions. III. That it be *attested* by three or four witnesses, *in the presence of the testator.*

3. A devise of lands or tenements must be reduced into writing in the lifetime of the devisor; for it is not sufficient that it be put into writing after his death, being first declared by words only, for then it is but a nuncupative will.

4. It is *not material* upon *what matter or stuff*, whether paper or parchment; or in *what language*, whether English, Latin, French, &c. or in *what kind of handwriting or character*, a devise is written, so that it be fair and legible, and the meaning be sufficiently apparent.[2] Neither is it material whether it be writ-

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[† In reference to the application of this act to the British Colonies in America, see stat. 22 Geo. 4, ch. 6, ss. 10, 11; and to lands in the East Indies, see 1 Jac. & Wal. 26.]

[1] By the stat. 7 W. 4, & 1 Vict. ch. 26, § 9, 11, 12, *two* witnesses are now sufficient, in England.

[2] Though it is deemed necessary to the validity of a *deed* that it be written on parchment or paper, as has already been seen, (*ante*, tit. 32, ch. 1, § 16,) yet it seems that the material on which a will is written is of no importance; the technical reason, in the case of a deed, being recognized only in proceedings at common law; whereas the probate of wills belongs to a different jurisdiction, governed by the rules of Courts of Equity. Nor is the kind of writing material, whether it be ink, or pencil; In re Dyer, 1 Hagg. 219; provided the Court be satisfied, in case it be in pencil, that the testator intended so to execute his will. Rymes *v.* Clarkson, 1 Phillim. 22; and see Green *v.* Skipworth, 1 Phillim. 53; Dickenson *v.* Dickenson, 2 Phillim. 173. For the use of a pencil, in writing, is not in itself conclusive of the intention of the party. It may be with a final intent, or it may be only deliberative. From the nature of the act, unexplained, the use of a *pencil* will be deemed *primâ facie, deliberative;* but the use of *ink* will be deemed *final.* But it will still be open to be determined, upon the collateral evidence, which of these was the actual intention of the party. Francis *v.* Grover, 5 Hare, 49; and see 2 Greenl. Evid. § 691, and cases there cited. The rule is the same in regard to subsequent alterations made in a will. Francis *v.* Grover, *supra.* [It is

ten at large, or by *notes usual or unusual;* or whether sums of money given be expressed at full length, or *in figures,* provided it be free from all doubt and ambiguity.

5. Thus, where a will, in which legacies charged on lands were written in figures, was scarcely legible, it was referred to a master to examine and see what those legacies were; and he was directed to call to his assistance persons skilled in the art of writing. (*a*)

6. A will may be written at several times, and on *several sheets* of paper, unconnected with each other; although the proper mode, where a will is written on several sheets of paper, is, to join them together by means of a piece of tape sealed. (*b*)

7. The *next circumstance,* necessary to the validity of a devise of lands, is, that it be *signed by the devisor,*[1] *or by some other person, in his presence, and by his direction.* The latter part of this clause was inserted for the benefit of those persons who, from sickness or some other misfortune, should be incapable of writing their name, or making their marks. And where a will is written on several sheets of paper, it is the usual practice for the testator to sign each page.

48 * * 8. The framers of the Statute of Frauds chose signing, rather than sealing and delivery, the solemnities required in deeds; because seals, though formerly a great mark of distinction in families, were much disused when this statute was made, and people sealed with any seal; so that signing, as used in the Roman law, was preferred. (*c*)

9. If the testator's name be *written by himself, in any part of a will,* either at the beginning or at the end, it will be considered as a sufficient signing within the statute.[2]

(*a*) Masters *v.* Masters, 1 P. Wms. 425. (*b*) 1 Show. R. 66. (*c*) Gilb. R. 261.

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not essential that the parts of the will should be physically connected, if they are connected by their internal sense. Wyckoff's Appeal, 15 Penn. State, (3 Harris,) 281; Martin *v.* Hamlin, 4 Strobh. 188.]

[1] The "*signature,*" consists both of the *act of writing* his name, and of the *intention* of thereby finally authenticating the instrument. It is not necessary that the entire name be written; his *mark* is now held sufficient; even though he be able to write. Baker *v.* Dening, 8 Ad. & El. 94; Taylor *v.* Draing, 3 N. & P. 228; In re Bryce, 3 Curt. 325; In re Field, Ibid. 752; Wilson *v.* Beddard, 12 Sim. 28; Harrison *v.* Elvin, 3 Ad. & El. 117, N. S.; Jackson *v.* Van Dusen, 5 Johns. 144; *Infra,* § 19, note; [Shinkle *v.* Crock, 17 Penn. State R. (5 Harris,) 159; Davies *v.* Morris, Ib. 205.]

[2] This has been altered, in England, by the stat. 7 W. 4, & 1 Vict. c. 26, § 9, 11, 12,

10. A person wrote his will with his own hand, beginning thus, "I, John Stanley, make this my last will and testament;" and put his seal, but did not subscribe his name to it. This was adjudged to be a good will; for being written by himself, and his name in the will, it was a sufficient signing within the statute; which did not appoint where the will should be signed, at the top, bottom, or margin; and therefore a signing in any part was sufficient. And three of the Judges were of opinion, that the putting his seal had, of itself, been a sufficient signing

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which requires that the signature be at the foot or end of the instrument. Such is also the law in *Ohio, Pennsylvania, New York,* and *Arkansas. Supra,* § 1, note. But in the other States, in the absence of any statute provision, the English rule prevails, as it stood before the passage of the act above mentioned. Sarah Miles's Will, 4 Dana, 1; 4 Kent, Comm. 515, 516; [Tonnele *v.* Hall, 4 Comst. 140.] It is a question of fact, whether the signature, in whatever part of the will it is placed, was made with the *final intention* of authenticating the will. *Supra,* § 7, note. And this at least in the case of an holograph, ought to appear from the instrument itself. Waller *v.* Waller, 1 Gratt. 454.

Upon the English statute, requiring that the signature of a will be made "at the foot or end thereof," it has been held, that these words are to be construed strictly; and that the signature, as distinguished from the attestation-clause, must be made *at* the foot or end (strictly read) of the will; and therefore an allegation, pleading circumstances fully accounting for the signature being at some distance from the termination of the previous writing, has been rejected. Smee *v.* Bryer, 13 Jur. 103, 289. And see Ayres *v.* Ayres, 1 Rob. Eccl. R. 466; 11 Jur. 417; In re Chaplyn, 10 Jur. 210. But where a clause, written previously to the execution of the will, ran partly opposite to and partly beneath the signatures of the testator and of the witnesses, it was held to be a sufficient signing at the end of the will, to satisfy the demand of the statute. In re Powell, 1 Rob. Eccl. R. 421. So, where the will was an holograph, the *testatum* clause being also in the handwriting of the testatrix, in these words:—"In witness whereof I have hereunto set my hand and seal, Jane Randolph Gunning, this twenty-fifth day of September, eighteen hundred and forty-five;" with no subsequent signature; this was held to have been signed in conformity with the statute. In re Gunning, 1 Rob. Eccl. R. 459. In the following cases, the will was rejected for want of strict compliance with the statute, as to the place of signature. In re Jones, 1 Rob. Ec. R. 424; In re Howell, Id. 671; In re Ensell, Id. 702; In re Scarlett, 10 Jur. 211. The following are cases in which, after contest, the signature was held sufficient. In re Corder, 1 Rob. Ec. R. 669; 12 Jur. 966; In re Harris, 1 Rob. Ec. R. 703; 13 Jur. 285; In re Brown, 1 Rob. Ec. R. 710; In re Beadle, 1 Rob. Ec. R. 749; 13 Jur. 478; In re Bauly, 1 Rob. Ec. R. 751; 14 Jur. 514; In re Dawney, 14 Jur. 318. Where the testator was blind, his signature after a blank space of four inches was held sufficient. In re Hellings, 1 Rob. Ec. R. 753; 13 Jur. 568; [Jermyn *v.* Hervey, 1 Eng. Law and Eq. R. 633; In re Anderson, Ib. 634.] See also In re Woddington, 2 Curt. 324; In re Carver, 3 Curt. 29; In re Davis, Ibid. 748; In re Bullock, Ibid. 750; In re Martin, Ibid. 754; In re Gore, Ibid. 748.

within the Statute of Frauds; for *signum* was no more than a mark that it was his will. (*a*)

11. The position, laid down in the preceding case, that sealing a will is a sufficient signing within the Statute of Frauds, is very doubtful; for although Sir J. Strange reports, that in 13 Geo. I., on an issue directed out of Chancery, of *devisavit vel non*, the Chief Justice ruled, that sealing a will was a signing within the Statute of Frauds, yet in a subsequent case, 25 Geo. II., it was said by Lord Ch. B. Parker, Baron Clive, and Baron Smythe, (*absente* Legge,) that the opinion, advanced in 3 Lev. 1, that sealing was a sufficient signing, was a strange doctrine; for if it were so, it would be very easy for a person to forge any man's will, by only forging the names of any three obscure persons, as there would be no occasion to forge the testator's name: and the Barons said, if the same should come in question again, they should not hold that sealing a will only, was a sufficient signing within the statute. (*b*) [1]

12. The want of signing all the sheets of a will cannot be supplied; so that if the devisor should intend to sign the remaining sheets, but becomes incapable of doing it by sickness, such an execution will not be deemed sufficient.

13. A will was prepared and written on five sheets of
49* paper, * and a seal affixed to the last, and also the form and attestation written on it. The will was then read over to the testator in the presence of three witnesses, who afterwards subscribed, and the testator set his mark to the first two sheets in their presence, and attempted to set it to the third; but being unable, from the weakness of his hand, he said, "I cannot do it, but it is my will." After this the three witnesses went away, being desired to come again. The testator died, without setting his mark to the last three sheets. (*c*)

(*a*) Lemayne *v.* Stanley, 3 Lev. 1. (Seldon *v.* Coalter, 2 Virg. Cas. 553. Lee *v.* Libb, 1 Show. 69.)

(*b*) Warneford *v.* Warneford, 2 Stra. 764. Smith *v.* Evans, 1 Wils. R. 313. Grayson *v.* Atkinson, 2 Vez. 459. 1 Ves. 13. 17 Ves. 459.

(*c*) Right *v.* Price, 1 Doug. 241. See also 1 Mer. 503.

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[1] In the United States, *a seal* is nowhere necessary to the validity of a will. *Supra*, § 1, note. But if a seal is affixed, as a part of the solemnity, though superfluous, and is afterwards torn off by the testator, *animo revocandi*, this may amount to a revocation. Avery *v.* Pixley, 4 Mass. 460, 462.

Lord Mansfield said, the will was not duly executed; for when the testator signed the first two sheets, he had an intention of signing the other sheets, but was not able; he therefore did not mean the signature of the first two sheets as a signature of the whole will: there never was a signing of the whole. The Court, to be sure, would lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute had been complied with; but here there was no room for presumption. Adjudged that the will was not duly executed.[1]

14. The *third circumstance*, required by the Statute of Frauds to the validity of a devise is, that it should be *attested and subscribed, in the presence of the testator, by three or four witnesses.*[2]

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[1] Where a will, which was written on three sides of one sheet and duly attested, concluded by stating that "the testator had *signed his name to the first two sides thereof*, and his hand and seal to the last;" but in fact he had only put his name and seal to the last page, omitting to sign his name on the first two; it was *held*, that the will was well executed; for whatever might have been his original intention, it appeared to have been abandoned at the time of the final execution of the instrument. See Winsor *v.* Pratt, 5 Moore, 484; 2 Brod. & Bing. 650, where the case in the text is commented on.

[2] In the several American States, the number of witnesses required is not everywhere the same; some requiring three and some only two; while in *Pennsylvania* none are required to subscribe their names to the will, though their presence is necessary. See *supra*, § 1, note. But wherever *attesting* witnesses are required, the statute means something more than the bare subscribing their names; it implies a knowledge of the existence of those facts which constitute the legal execution of the instrument as a will. Swift *v.* Wiley, 1 B. Monr. 117. It is sufficient, as a valid attestation, if the witness, when requested to attest the will, adopts his signature already on the instrument, without subscribing it again. Pollock *v.* Glassell, 2 Gratt. 439. And an attestation by signing only the initials of his name, has been held sufficient. Jackson *v.* Van Deusen, 5 Johns. 144; Adams *v.* Chaplin, 1 Hill, Ch. R. 266, S. Car. If the will on its face, appears to have been duly executed, the presumption is in its favor, that it was so executed. And the presumption is the same, if the witnesses have no recollection of the transaction, and remember nothing to the contrary; for positive affirmative evidence of the facts, by the subscribing witnesses, is not absolutely essential. Burgoyne *v.* Showler, 8 Jur. 814; In re Leach, 12 Jur. 381; Blake *v.* Knight, 3 Curt. 547; Doe *v.* Davis, 11 Jur. 182; Clarke *v.* Dunnavant, 10 Leigh, 13. And though the attesting witness is expected to know something more of the transaction, than the mere act of the testator's signature, yet where a will, made in the execution of a power, was required to be signed and published by the donee, in the presence of and attested by two or more credible witnesses; and it was attested thus,—"We the undersigned attest to have seen the above testator sign the above will;" it was held to be, in effect, attestation to the publication, as well as to the signature. Bartholomew *v.* Harris, 15 Sim. 78. See also Warren *v.* Postlethwaite, 9 Jur. 721. *Sed Vid.* Allen *v.* Bradshaw, 4 Curt. 110. *Semb. Contra.*

No person ought to attest a will, unless he is already satisfied that the testator is of

In this instance, the statute adopts the mode prescribed by the civil law, in *testamentis solemnibus*, not as laid down in Justinian's Institutes, but as reformed by the code, in the Novels; and the evil, meant to be remedied by the makers of the Statute of Frauds was, the secret and private manner in which wills were formerly executed. (*a*)

15. Where *the testator owns his handwriting* before the witnesses, it is sufficient, though they do not see him sign his name.

16. Thus, in proving a devise of lands in the Court of Chancery, the evidence was full that the three witnesses did subscribe their names in the presence of the testatrix; one of them however, said he did not see the testatrix sign, but that she owned, at the time when the witnesses subscribed, that the name signed to the will was her own handwriting; which Sir J. Jekyll held without all doubt, to be sufficient. (*b*)

17. On a bill to establish a will against an heir at law, he by his answer made a doubt, whether, as all the witnesses
50 * did not * see the testator sign, this was a good attestation within the statute. (*c*)

(*a*) Gilb. R. 261. (*b*) Stonehouse *v.* Evelyn, 3 P. Wms. 254.
(*c*) Grayson *v.* Atkinson, 2 Vez. 454.

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sound and disposing mind, and has full understanding of the disposition he is making of his estate. Scribner *v.* Crane, 2 Paige, 147.

Whether, if the witnesses subscribe their names *before* the testator has signed the will, it is a sufficient attestation of the will, *quære*. In England, under the statute of 1 Vict. c. 25, § 9, it is held that it is not. Cooper *v.* Brockett, 3 Curt. 648; In re Byrd, Ibid. 117; In re Olding, 2 Curt. 865. But in this country the priority has been held immaterial. Swift *v.* Wiley, *supra;* and see Pollock *v.* Glassell, *supra*.

In *New York, New Jersey*, and *Arkansas*, the statute requires, not only that the testator should *sign* the instrument, or acknowledge the signature, in presence of the witnesses, but that he should also *declare* it to be his will. N. York Rev. St. Vol. II. p. 124, § 32, 3d ed.; N. Jersey Rev. St. 1846, p. 636, § 2; Ark. Rev. St. 1837, ch. 157, § 4. A distinct publication of the will, as a will, is thus made indispensable to its validity. No particular form of expression is necessary, but the declaration that it is his *will* must be unequivocal; it is not sufficient to say that it is his "will *or agreement.*" The witnesses, moreover, must know that it is his will, and that he understood it to be so, and intended to execute it as such. See Brinckerhoff *v.* Remsen, 8 Paige, 488; 26 Wend. 325, S. C.; Chaffee *v.* Baptist M. C. 10 Paige, 85; Heyer *v.* Berger, 1 Hoffm. Ch. R. 1; Den *v.* Milron, 7 Halst. 70; Rutherford *v.* Rutherford, 1 Denio, 33. [Lewis *v.* Lewis, 1 Kernan, N. Y. 220; Newhouse *v.* Godwin, 17 Barb. 236; Tyler *v.* Mapes, 19 Ib. 448; Seymour *v.* Van Wyck, 2 Selden, N. Y. 120; Torry *v.* Bowen, 15 Barb. 104; Van Buren *v.* Cockburn, 14 Ib. 118; Lewis *v.* Lewis, 13 Ib. 17; Brown *v.* De Selding, 4 Sandf. Sup. Ct. 10; Rogers *v.* Diamond, 8 Eng. (13 Ark.) 474.]

Lord Hardwicke.—"This had been *vexata questio* a great while; whether to make a will effectual, according to the statute, the signing of the testator thereto should be in the presence of all, or indeed of any of the witnesses; or whether the testator's acknowledging the handwriting to that will to be his, is not sufficient. It is insisted that the word "*attested*," superadded to "*subscribe*," imports they shall be witnesses to the very act and *factum* of signing: and that the testator's acknowledging that act to have been done by him, and that it is his handwriting, is not sufficient to enable them to attest; that is, it must be an attestation of the thing itself, not of the acknowledgment. To be sure, it must be an attestation of the thing in some sense: but the question is, if they attest upon the acknowledgment of the testator that it is his handwriting, whether that is not an attestation of the act; and whether it is not to be construed as agreeable to the rules of law and evidence, as all other attestation and signing might be proved. At the time of making the act of Parliament, and ever since, if a bond or deed is executed by the person who signs it, afterwards the witnesses are called in, and before those witnesses he acknowledges it to be his hand; that is always considered to be a signing by the person executing, and is an attestation of it by them. The case of Lemayne *v.* Stanley (*a*) is an express authority, and must have been by an acknowledgment of the testator's hand: no answer can be given to it, but a presumption that the testator might write the will in the presence of the three witnesses; but this is not a natural presumption; for if the fact were so, it would have been found by the jury, as it would have put it out of all doubt. Therefore, on the penning of the act, and the authorities, my opinion is, that this will is well executed; but being a question of law, if the heir insists on having it tried, I will direct a trial." A trial was accordingly directed.

18. The doctrine here laid down was soon after fully confirmed by a determination of Lord Hardwicke, assisted by Sir John Strange, Lord Ch. J. Willes, and Lord Ch. B. Parker, in which it was unanimously resolved, that the declaration of a testator, before three witnesses, that a paper was his will, was equivalent *to signing it before them, and con- *51

(*a*) *Ante*, s. 10.

stituted a good will within the 5th section of the Statute of Frauds. (*a*) † [1]

19. It has been determined in a late case, that an attestation

(*a*) Ellis *v.* Smith, 1 Ves. 11. Westbeech *v.* Kennedy, 1 V. & B. 362. (Wright *v.* Wright, 5 Mo. & P. 316. 7 Bing. 457.)

[† See also White *v.* Trustees of the British Museum, 6 Bing. 310; Wright *v.* Wright, 7 Ibid. 457; Johnson *v.* Johnson, 1 Crom. & Mees. 140.]

[1] The question, what amounts to an acknowledgment of the signature, has been much discussed, and the decisions are various; but the inclination of the Courts is, to give a liberal construction to the statute, in regard to the attesting witnesses' knowledge of the testator's signature; and to hold it sufficient, if it appear that the testator did, in some satisfactory manner, acknowledge the paper to be his, as an instrument already executed by him. White *v.* British Museum, 6 Bing. 310; Wright *v.* Wright, 7 Bing. 457; Johnson *v.* Johnson, 4 C. & M. 140; Hall *v.* Hall, 17 Pick. 373; Dewey *v.* Dewey, 1 Met. 349; Hogan *v.* Grosvenor, 10 Met. 54; Loy *v.* Kennedy, 1 Watts & Serg. 396. See also 2 Greenl. Evid, § 676; 1 Jarm. on Wills, [72] (2d Am. ed.) and the cases cited in Perkins's note.

The English statute of 1 Vict. c. 26, § 9, has somewhat changed the law on this subject, by a provision not contained in the Statute of Frauds, namely, that the *signature* of the testator "be made *or acknowledged* by him in the presence of two or more witnesses, present at the same time." Under this statute it is held requisite that the testator acknowledged *the signature* as his own; and that, though no set form of words is necessary for this purpose, yet it must appear that the will was actually signed, at the time, and that the witnesses *saw* the signature. Therefore, where the witnesses were merely requested thus,—"sign your names to this paper;" the will being produced and attested by them accordingly, but without more saying; it was held insufficient. In re Rawlins, 2 Curt. 326. And more recently, in a case well considered, the mere circumstance, that the deceased called two witnesses "to sign a paper for him," which they did in his presence, but without being informed as to the nature of the instrument, or being able to see whether any writing was upon it, the paper being doubled down, was held not to amount to an acknowledgment of the signature, so as to satisfy the statute. Ilot *v.* Genge, 3 Curt. 160, 4 Moore, 265. And see In re Warden, 2 Curt. 334; Blake *v.* Knight, 3 Curt. 547; In re Ashmore, Ibid. 607; Hudson *v.* Parker, 8 Jur. 376.

In *New York*, and in *Arkansas*, the Statute of Wills requires, that the subscription of the will by the testator shall be made "in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses." See N. Y. Rev. St. Vol. II. p. 124, § 2, (3d ed.); Ark. Rev. St. 1837, c. 157, § 4; [*Ante*, § 14, n. 1.] The principle of the recent decisions in England would therefore seem applicable in those States. The language of the statute of *Ohio*, (Rev. St. 1841, c. 129, § 2,) is substantially the same, requiring the presence of two or more competent witnesses, "who saw the testator subscribe, or heard him acknowledge the same." The statute of *Illinois*, (Rev. St. 1839, p. 686, § 2,) requires the subscribing witnesses to testify, at the probate of the will, "that they were present and saw the testator—sign said will,—in their presence; or acknowledge the same to be his or her act and deed." No other States are known to have legislated, in express terms, respecting the acknowledgment of the signature.

of a devise, by the witnesses *setting their marks* to the will, was good within the Statute of Frauds. (*a*) [1]

20. It has also been determined, that it is not necessary to the validity of the execution of a will of lands by a *blind man*, that it should be read over to him in the presence of the attesting witnesses. (*b*) [2]

21. The *witnesses ought to see the whole will;* for if they only see the last sheet, on which they subscribe their names, it is doubtful whether that be sufficient. The presumption however is, that all the sheets, on which a will is written, are in the room where the witnesses attest, unless the contrary be proved.

22. Sir T. Chitty made his will, consisting of two sheets of paper, all in his own handwriting, and signed his name at the bottom of each page. The sentences and words were so connected, from the bottom of each page to the top of the next, and particularly from the fourth side of the first sheet to the first side of the second sheet, that they were imperfect and nonsensical if read apart, but clear and intelligible when read together. He also made a codicil in like manner on a single sheet. The testator then called in Francis Harding, showed him both sheets of the will, and his signature to every page, told him that was his will, and also showed him the codicil, and desired him to attest both, which he did on the last sheet of the will, and on the codicil, in the presence of the testator, and then left the room.

(*a*) Harrison *v.* Harrison, 8 Ves. 185. Ibid. 504.)
(*b*) Longchamp *v.* Fish, 2 Bos. & Pull. N. R. 415.

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[1] A *mark* is now universally deemed sufficient, as well in the case of a witness, as in that of the testator, to answer the requirement of *signing*, or subscribing his name, in the statute. See *supra*, § 7, note; 2 Greenl. Evid. § 677, (2d ed.) and cases there cited; 1 Greenl. Evid. § 272, (4th ed.); Chaffee *v.* Baptist M. C. 10 Paige, 85; Adams *v.* Chaplin, 1 Hill, S. Car. Rep. 266; Dew *v.* Milton, 7 Halst. 70; Collins *v.* Nichols, 1 Har. & J. 399; Madison *v.* Zabriskie, 11 Louis. R. 251; 9 Louis. R. 512; Civ. Code, Louis. art. 1575; In re Ashmore, 3 Curt. 756.

[2] Though the testator were blind, yet he must be sensible of the presence of the witnesses, through his remaining senses, and that they subscribed the will in his presence. Reynolds *v.* Reynolds, 1 Spears, 256, 257; Boyd *v.* Cook, 3 Leigh, 32; Barton *v.* Robins, 3 Phillim. 455, note; In re Percy, 1 Rob. Eccl. R. 278; [Ray *v.* Hill, 3 Strobh. 297.] Where the will of a blind person was drawn in conformity with the instructions given by the testatrix to her solicitor, it was held good, though not proved to have been read over to her previous to the execution. Edwards *v.* Fincham, 4 Moore, 198; 2 Greenl. Evid. § 678, note.

John Vaughan and John Leyland came in immediately afterwards; the testator showed them the codicil, and the last sheet of the will, and sealed them in their presence; took each of them up, and severally delivered them as his act and deed. These witnesses then attested the same in the testator's presence, but never saw the first sheet of the will, nor was it produced to them, nor was the same or any other paper on the table. After the testator's death both sheets of paper were found in his bureau, not pinned together, but wrapped up together
52* with the *codicil in one piece of paper. The question was, whether the will was duly attested, according to the Statute of Frauds. (*a*)

The case was several times argued before all the Judges in the Exchequer Chamber; and Lord Mansfield acquainted the bar, that there had been a conference among all the Judges, except Mr. Baron Adams, who was out of town, upon this case, which was an amicable suit, to try the real merits of the question. It occurred to the Judges, that the way in which the parties had put the case did not go to the whole merits, because if the first sheet was in the room at the time when the latter sheet was executed and attested, there would remain no doubt of its being a good will, and a good attestation of the whole will; but if the first sheet was not then in the room, a doubt might arise whether it was, or was not, a good attestation, as to the real estate. However, no opinion was given or formed by the Judges upon such doubt which might so arise, if it should appear that in fact the first sheet was not then in the room. A will, properly attested, might, by reference to another instrument, establish particular clauses, so ascertained by a clear reference, as strongly as if the clauses so referred to had been repeated in the will *verbatim;* and there were references in this will from one part to another. Every presumption ought to be made by a jury in favor of such a will, when there was no doubt of the testator's intention. It was not necessary that the witnesses should attest in the presence of each other, or that the testator should declare the instrument he executed to be his will; or that the witnesses should attest every page, folio, or sheet; or that they should know the contents; or that each folio, page, or sheet should be particularly

(*a*) Bond *v.* Seawell, 3 Burr. 1773. 1 Black. R. 407. (Gass *v.* Gass, 3 Humph. 278.)

shown to them. This had been settled: but the fact whether the first sheet of the will was or was not in the room, at the time of the executing and attesting the latter, might be material to be known; if it was, the jury ought to find for the will generally, and they ought to find all things favorable to the will. If it was doubtful whether the first sheet was then in the room or not, they all thought the circumstances sufficient to presume that it was in the room, and that the jury ought to be so directed; but upon a special verdict nothing could be presumed; therefore they were all of opinion that it ought to be tried over again; and if the jury should be of opinion that it was then in the room, they ought to find for the will generally; and they ought to
*presume, from the circumstances proved, that the will *53
was in the room.

23. The statute expressly requires, that the witnesses should attest and subscribe the will *in the presence of the testator*, lest another will should be substituted instead of the real one. (*a*) [1]

24. Thus, where a person subscribed his will in the presence of three witnesses, who, for the ease of the testator, went down into another room, and subscribed it there, it was held to be void. (*b*)

(*a*) Lord Rancliffe *v.* Parkyns, 6 Dow, 202.

(*b*) Broderick *v.* Broderick, 1 P. Wms. 239. (Dunlap *v.* Dunlap, 4 Desau. 311.)

[1] The testator must be able, without changing his situation, to see and identify the instrument, if he is so disposed, though in fact he does not attempt so to do; and he must have mental knowledge and consciousness of that fact. If sick in bed, he must be able to do this without leaving his bed. Tod *v.* E. of Winchelsea, 2 C. & P. 488; 1 M. & M. 12; Doe *v.* Manifold, 1 M. & S. 294; Tribe *v.* Tribe, 1 Rob. Eccl. R. 775; 13 Jur. 793. If he were in a state of insensibility at the moment of attestation, it is void. Right *v.* Price, 1 Doug. 241. Being in the same room with the testator, is *primâ facie* evidence that the attestation was in his presence; but if the attestation was in another room, though separated by folding-doors, it is, *primâ facie*, not an attestation in his presence; the presumption, in both cases, being open to the control of other evidence, it being a mere question of fact. Neil *v.* Neil, 1 Leigh, R. 6, 10–21, where the cases are ably reviewed by Carr, J. See also, In re Colman, 3 Curt. 118; Russell *v.* Falls, 3 Har. & McH. 457; 1 Greenl. Evid. § 272; 2 Greenl. Evid. § 678; 4 Kent, Comm. 515, 516; Reynolds *v.* Reynolds, 1 Spears, 253; Howard's Will, 5 Monr. 199; Edelin *v.* Hardey, 7 H. & J. 61; Clerk *v.* Ward, 4 Bro. P. C. 71; Dewey *v.* Dewey, 1 Met. 349. As to what is meant by "changing his situation," see the able arguments of counsel in Russell *v.* Falls, *supra*. The presence of the testator is not required by the laws of *Arkansas*, *New York*, or *New Jersey*. *Supra*, § 1, note; [Boldry *v.* Parris, 2 Cush. 433; Sturdivant *v.* Birchett, 10 Gratt. (Va.) 67; Nock *v.* Nock, Ib. 106; Moore *v.* Moore, 8 Ib. 307; Rosser *v.* Franklin, 6 Ib. 1; Graham *v.* Graham, 10 Ired. (N. C.) 219.]

25. But if there be a *possibility of the testator's seeing the witness attest*, it will be sufficient, unless the contrary is proved. (*a*)

26. A testator desired the witnesses to go into another room, seven yards distant, to attest his will, in which there was a window broken, through which the testator might see them; and it was held that this will was well attested, according to the statute; for it was sufficient that the testator might see the witnesses, and not necessary that he should actually see them; for in that case, if a man should turn his back, or look another way, it would vitiate the will. So if the testator, being sick, should be in bed with the curtains closed. (*b*)

27. There were four witnesses to a will, one of whom was gone beyond sea; two of them swore that they saw the will executed by the testatrix, and that they subscribed the same in her presence; the third swore that he subscribed the will as a witness in the same room, and at the request of the testatrix. (*c*)

Lord Cowper doubted as to the proof of the execution of the will; and the matter coming on again before Lord Macclesfield, he observed, I. That the proper way of examining a witness to prove a will of land was, that the witness should not only prove the execution of the will by the testator, and his own subscribing it, but likewise that the rest of the witnesses subscribed their names in the presence of the testator; and then one witness proves the full execution of the will, since he proves that the testator executed it, and also that the three witnesses subscribed it in his presence. II. He held, that the bare subscribing of the will by the witnesses in the same room, did not necessarily imply it to be in the testator's presence, for it might be in a corner of the room, in a clandestine, fraudulent way; and then it
54.* would not be a subscribing by the witnesses in the *testator's *presence, merely because in the same room. But it being sworn by the witness, that he subscribed the will at the request of the testatrix, and in the same room, this could not be fraudulent; and therefore the will was well executed.

28. A married woman, having a power to make a writing in the nature of a will, ordered a will to be prepared, and went to an attorney's office to execute it; but being asthmatic, and the

(*a*) (Tod *v.* E. of Winchelsea, 2 C. & P. 488. 1 Greenl. Evid. § 272.)
(*b*) Shires *v.* Glascock, 2 Salk. 688. 1 Ld. Raym. 507.
(*c*) Longford *v.* Eyre, 1 P. Wms. 740.

office very hot, she *retired to her carriage*, to execute the will, the witnesses attending her; who, after having seen her execute it, returned into the office to attest it, and the carriage was put back to the window of the office, through which it was sworn by a person who was in the carriage, that the testatrix *might* see what passed. Immediately after the attestation, the witnesses took the will to her, which she folded up, and put into her pocket. It was decreed that the will was well attested. (*a*)

29. Although the witnesses to a will must subscribe it in the presence of the testator, yet the Statute of Frauds does not require that this circumstance should be *taken notice of in the attestation;* and whether inserted or not, the fact, if denied, must be left to the jury; for neither the insertion nor omission of this circumstance is conclusive.[1]

30. In ejectment by an heir at law, the question for the opinion of the Court was, if it should be left to a jury to determine, whether the witnesses to a will, being all dead, set their names in the presence of the testator; and this merely upon circumstances, without any positive proof. (*b*)

The Court said, this was a matter fit to be left to a jury. The witnesses, by the Statute of Frauds, ought to set their names as witnesses in the presence of the testatrix; but it was not required by the statute that this should be taken notice of in the subscription to the will; and whether inserted or not, it must be proved; if inserted it did not conclude, but it might be proved *contra*, and the verdict might find it *contra*. Then, if not conclusive when inserted, the omission did not conclude it was not so; and therefore must be proved by the best proof which the nature of the thing would admit of. In case the witnesses were dead, there could not probably be any express proof, since, at the execution of wills, few were present but the devisor and the

(*a*) Casson *v.* Dade, 1 Bro. C. C. 99.
(*b*) Hands *v.* James, Com. R. 531. Willes R. 1, S. P.

[1] In *Missouri*, it has been held, that the subscribing witnesses ought to attest not only the act of signing, but the sanity of the testator at the time. Withinton *v.* Withinton, 7 Misso. R. 589. But the statute, in express terms, only requires that the will "be attested by two or more competent witnesses, subscribing their names to the will, in the presence of the testator." Rev. St. 1835, p. 617; Rev. St. 1845, p. 1079.

witnesses. Then, as in other cases, the proof must be
55* circumstantial; *and here were circumstances. I. Three witnesses had set their names, and it must be intended that they did it regularly. II. One witness was an attorney of good character, and might be presumed to understand what ought to be done, rather than the contrary; and there might be circumstances, to induce a jury to believe that the witnesses set their hands in the presence of the testatrix, rather than the contrary; and it being a matter of fact, was proper to be left to them. The plaintiff was nonsuited.

31. The same question arose in a subsequent case, on a trial at bar in ejectment. The defendant made title under a will, the attestation of which was in these words, "Signed, sealed, published, and declared as and for his last will in the presence of us, A, B, and C." The witnesses were all dead, and their hands proved in common form. It was objected that this was not an execution, according to the Statute of Frauds; and the hands of the witnesses could only stand as to the facts they had subscribed to; and signing in the presence of the testator was not one. The Court, on the authority of Hands *v.* James, said, it was evidence to be left to a jury or a compliance with all the circumtances. A verdict was given for the will. (*a*)

32. By the Roman law, it was necessary that all the witnesses should be present at the same time; and some doubts were formerly entertained whether the same circumstance was not required by the Statute of Frauds; but it is now fully settled, that although the witnesses *attest at different times*, yet it is sufficient. (*b*)[1]

33. A will of lands attested by three witnesses, who at several times subscribed their names, at the request of the testator, but were not present at once together, was decreed to be well attested, within the statute. (*c*)

(*a*) Croft *v.* Pawlet, 2 Stra. 1109.

(*b*) (2 Greenl. Evid. § 676. Dewey *v.* Dewey, 1 Met. 349. 4 Kent, Comm. 516. Dunlap *v.* Dunlap, 4 Desau. 312. Elbeck *v.* Granberry, 2 Hayw. 232.) (*c*) Anon. 2 Ch. Ca. 109.

[1] The statute of 1 Vict. c. 26, § 9, requires that all the witnesses be present at the time of signing or acknowledgment. And this is deemed to require the attestation of all at that time. In re Simmonds, 3 Curt. 79; Moore *v.* King, Ibid. 243. See 1 Jarm. on Wills, [72] note by Perkins.

34. On a bill of review, to reverse a decree of Lord Nottingham, for the sale of lands, subjected by a will to the payment of debts; the will was written in the testator's own hand, and published in the presence of three several witnesses, at three several times, and they all attested it in his presence. One of the objections to the decree was, that it was no good will within the Statute of Frauds, because not attested by all the witnesses at one time. Lord Keeper Wright held a publication of a will before three witnesses, though at three several *56 times, good within the statute. (*a*)

35. In ejectment, a special verdict was found, that a testator executed his will in the presence of two witnesses, who attested the same in his presence; that four years after, the testator went over his name with a pen, in the presence of a third witness, who subscribed his name in his presence, and at his request. Mr. Henley argued for the heir at law, that the statute requiring three witnesses to subscribe in the testator's presence, must intend they should be all present together, else there was not that degree of evidence which the statute required; for an attestation of three witnesses, at different times, had only the weight of one witness. Witnesses to a will not only attest the due execution of it, but likewise the capacity of the testator at the time of execution. A man might be sane, at the time when two of the witnesses attest, and insane when the third attests. It could not be considered as a will, till the third witness had signed it, for that completed the act. (*b*)

Mr. Banks argued, on behalf of the devisee, that a will, executed in the presence of three witnesses, though they attested it at different times, was good, within the Statute of Frauds; because that statute did not require that all the witnesses should be present at the same time. The requisites under the statute were, that the testator should sign, in the presence of three witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites, which the act did not mention, and in fact making a new law.

Lord Ch. J. Lee.—"This case depends on the words of the statute; the requisites in the statute are, that the three witnesses should attest the signing of the testator; but it does not direct

(*a*) Cook *v.* Parsons, Prec. in Cha. 184. (*b*) Jones *v.* Lake, 2 Atk. 176, n.

that the three witnesses should be all present at the same time. There has been no determination as to this point. In the case of Cook *v.* Parsons, (*a*) the testator's signing was held good, though it was not before three witnesses at the same time; and the Court only doubted whether the testator's barely owning the subscription to be his, before one of the witnesses, was good; but there was no doubt as to the validity of the will, from the execution at different times. Here you have the oaths of three attesting witnesses; this is the degree of evidence required
57* by the statute; and the same credit is given to three *persons, at three different times, as at the same time. We cannot carry the requisites further than the statute directs; the act is silent as to this particular; it would therefore be making a new requisite. The signing is the same act reiterated; the testator in the principal case went over his name again, and declared it to be his last will." Judgment against the heir at law. (*b*)

36. It was formerly held, that every will and every *codicil must be separately attested by three witnesses;* for the attestation of two witnesses to a will, and of a third witness to a codicil, annexed to such will, was held insufficient; nor could the attestation of a codicil operate in any case as the attestation of a will, to which it was declared to be annexed.

37. A person made his will in writing, by which he devised lands, and sealed and published it in the presence of two witnesses only, who subscribed it in his presence. A year after, he caused another writing to be prepared, which recited that he had made his will, and confirmed it in all things; and said, "and my will is, that this codicil be taken to be of force, and part of my will." (*c*)

It was found that the codicil was attested by two witnesses, one of whom was witness to the will, the other not; and it was further found, that the codicil was distinct from, and not annexed to the will.

Lord Ch. J. Holt delivered the opinion of the Court, that this was not a good will within the statute, for want of three attest-

(*a*) *Ante*, s. 34. (*b*) Westbeech *v.* Kennedy, 1 Ves. & B. 362. *Vide*, 1 Ves. 14, 16.
(*c*) Lee *v.* Libb, Rep. Temp. Holt, 742. 3 Salk. 395. 1 Show. 69, 88. (Dunlap *v.* Dunlap, Desau. 312.)

ing witnesses. The codicil would not carry the land without the will, nor the will without the codicil. And the three witnesses within the statute ought to be witnesses to the whole.

38. A person devised freehold lands to a college, by a will written with his own hand, but not attested by any witness. The testator afterwards made a codicil, attested by four witnesses, wherein he recited his will. (*a*)

It was determined that the attestation of the codicil could not operate so as to render the will valid; for the codicil might be executed in another place, and the witnesses might not either see or know any thing of the will.

39. The doctrine laid down in the above case, appears doubtful, for in Habergham *v.* Vincent, which will be stated hereafter, Mr. J. Wilson, whom Lord Loughborough called to his assistance, is reported to have said,—"I believe it is true, and I have
*found no case to the contrary, that if a testator in his *58
will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper makes part of the will, whether executed or not; and such reference is the same as if he had incorporated it; because words of relation have a stronger operation than any other. As Lord Coke says, in his comment on Littleton, where Littleton is speaking of the word *heirs* being necessary to raise an estate of inheritance, Lord Coke makes this exception; if A enfeoff B and his heirs, and B enfeoffs A in as full and ample a manner as A has enfeoffed him, that will give the inheritance, without the word *heirs;* and it shall have effect by relation." (*b*)

40. Where a *codicil is written on the same sheet of paper with a will*, the attestation of the codicil by three witnesses establishes the will, though such will be not duly attested.

41. Sir James de Bathe, by his will, attested by only one witness, appointed Lord Fingall and Mr. Cruise to be guardians to his children. By a codicil written on the same sheet of paper, the testator expressed himself in the following manner:—"I do hereby make and declare this to be a codicil to my will hereunto annexed, in which said will I am disposed to make some altera-

(*a*) Att.-Gen. *v.* Barnes, Gilb. R. 5. Prec. in Cha. 270.
(*b*) 2 Ves. 228. 3 Burr. R. 1775.

tions." He then made alterations as to legacies, and concluded thus: "And in all other respects confirm my said will hereunto annexed." The codicil was attested by three witnesses. (*a*)

Mr. Alexander contended, on behalf of the guardians, that this appointment was clearly sufficient; the effect of a codicil, on the same sheet of paper with the will, expressly referring to it, as annexed, and confirming it in all respects, except as to the alteration of some legacies, being a reëxecution and republication, as it would be in the case of a devise of land, there being no difference in this respect between the two statutes.

Sir W. Grant, M. R., held clearly, that the appointment of guardians was good; the codicil, attested by three witnesses, adopting the will, and amounting to a reëxecution and republication; and a devise of land by the will would have been made good by the codicil. (*b*)

42. If *a will be made at several times*, although the parts be distinct, and separately signed by the testator; yet if it appear from circumstances to have been the intention of the tes-
59* tator,* that both instruments should constitute but one will, and not a will and a codicil, an attestation of the last part by three witnesses will amount to an attestation of the whole.

43. J. Griffin, on the 2d of May, 1752, wrote upon a sheet of paper, with his own hand, as follows:—"Know all men by these presents, that I John Griffin, make the after-mentioned my last will and testament." He then proceeded to give two freehold houses, and subscribed it; but there was no witness. In January, 1754, he wrote on the same sheet of paper the following words: "Memorandum, whereas I have laid out, &c. on a lighter, &c. and the barge called The Lemon, &c. all shall be at my wife's disposal; and this not to disannul any of the former part made by me, the 2d of May, 1752, except that my wife shall not be liable to pay to my son John, &c. Witness my hand, John Griffin." (*c*)

The will was written on the first and second sides of a sheet of paper, and the memorandum was begun either upon the end of the second, or the beginning of the third, and written upon

(*a*) De Bathe *v.* Fingall, 16 Ves. 167.
(*b*) 1 Ves. & Bea. 445. See also Doe *v.* Evans, 1 Crom. & Mee. 42.
(*c*) Carleton *v.* Griffin, 1 Burr. 549.

the third side; and all the second writing related only to the personal estate. The testator subscribed this in the presence of three witnesses; then he took the said sheet of paper in his hand, and declared it to be his last will and testament, in the presence of the said three witnesses; and then delivered it to them, and desired they would attest and subscribe it in his presence, which they accordingly did.

The question was, whether this will was duly attested, according to the Statute of Frauds.

Lord Mansfield said, the case was accurately put; for it was not stated to be either a will or a codicil, but a sheet of paper written, &c. At first, in 1752, the testator did not know that any witnesses were necessary; in 1754 he had found they were necessary; then he made a subsequent disposition, which was a *memorandum* to be added to it; but he did not call it a codicil, nor did the case state it to be so. He plainly considered the whole as one entire disposition, and he expressly declared in the latter, that he did not thereby mean to disannul any part of the former devise or dispositions. There is not a tittle in the latter that relates to the real estate; therefore the only intent of having the three witnesses was, and must be, to authenticate the former. Then the publication of it was, as of a will; he took up the * sheet of paper and said, it is my will; and certainly *60 he did not mean a part only, but the whole of it; and he desired them to attest it: all this must relate to the whole that was written on the paper. Adjudged that the will was duly attested.

44. With respect to *the persons who are capable of being witnesses* to a devise, the Statute of Frauds only mentions the word credible; and therefore *all those who are capable of being witnesses in any other matter*, may also be witnesses to a will.[1]

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[1] It is sufficient if the witnesses were competent at the time of attestation. If they have subsequently become incompetent, the will may be established by secondary evidence, as in other cases. The very able judgment of Lord Camden, to this effect, though overruled at the time by a majority of the Court, is now received as the true exposition of the statute. Doe *v.* Hersey, 4 Burn, Eccl. L. 88, also reported in a note to Cornwall *v.* Isham, 1 Day, 41–88. See Brograve *v.* Winder, 2 Ves. 634, 636; Amory *v.* Fellows, 5 Mass. 219, 229; Anstey *v.* Dowsing, 2 Stra. 1253, 1255.

In regard to the competency of witnesses to a will, as affected by their interest, the same rule governs here as in other cases, unless changed by statute; namely, that

The Judges were, however, formerly very strict, as to the competency of the witnesses to a devise; for neither a devisee, legatee, or creditor, was allowed to be a competent witness to a devise.

45. This occasioned the statute 25 Geo. II. c. 6, by which it is enacted, section 1: "That if any person attest the execution of any will or codicil, to whom any beneficial † devise, legacy, estate, interest, gift, or appointment, except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made; such devise, legacy, estate, interest, or appointment shall, so far only as concerns such person attesting the execution of such will or codicil, or any person

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where the person takes a personal and beneficial interest under the will, he is incompetent to testify in its support; but that where his interest is not personal or beneficial, but is merely fiduciary, he is competent, unless he is personally responsible, as a party, for costs. In some States, the executor is so responsible, at least in the first instance; while in others he is not; and hence the diversity in the decisions on this point. See, accordingly, against the competency, Sears *v.* Dillingham, 12 Mass. 358; Fox *v.* Whitney, 16 Mass. 118; Vansant *v.* Boileau, 1 Binn. 444; Beard *v.* Cowman, 3 Har. & McH. 152; Fenwick *v.* Forest, 6 Har. & J. 415; Vinyard *v.* Brown, 4 McCord, 24; Hayden *v.* Loomis, 2 Root, 350. So, the executor's interest in the commissions allowed him on the personalty, will exclude him as a witness. Tucker *v.* Tucker, 5 Ired. Law Rep. 161; Taylor *v.* Taylor, 1 Richard. 531. So, where he has already paid out one of the legacies. Hickle *v.* Eichleberger, 2 Barr, 483. [Nor is an executor, though renouncing, a competent witness to prove the will, where he is by the will appointed a trustee by name. Burritt *v.* Silliman, 16 Barb. 198. See also Workman *v.* Dominick, 3 Strobh. 589. Nor is a legatee a competent witness, if he merely assigns his claim in order to prove the will on which it depends. Haus *v.* Palmer, 21 Penn. (9 Harris,) 296.]

In favor of the competency, see McDaniel's Will, 2 J. J. Marsh. 331; Tucker *v.* Tucker, *supra;* Den *v.* Allen, 1 Penningt. 35; Comstock *v.* Hadlyme, 8 Conn. 254; Coalter *v.* Bryan, 1 Gratt. 18; Henderson *v.* Kenner, 1 Richard, 474; Overton *v.* Oyerton, 4 Dev. & Bat. 197. See 1 Jarm. on Wills [66] note by Perkins, 2d ed. So, as to legatees and devisees in trust. Haven *v.* Hilliard, 23 Pick. 10; Cornwall *v.* Isham, *supra;* Eustis *v.* Parker, 1 N. Hamp. 273. See further, 1 Greenl. Evid. § 333, 353; 2 Greenl. Evid. § 691, and cases there cited. Other cases as to the competency of witnesses in support of wills, are, Hall *v.* Hall, 17 Pick. 373; Clark *v.* Vorce, 19 Wend. 232; Deakins *v.* Hollis, 7 G. & J. 311; Tucker *v.* Sanger, 1 McCl. 435; Snellgrove *v.* Snellgrove, 4 Desau. 274; Shaffer *v.* Corbett, 3 Har. & McH. 513; Kerns *v.* Soxman, 16 S. & R. 315; [Snyder *v.* Bull, 17 Penn. 54; Search's Appeal, 13 Ib. 108.]

[† In Phipps *v.* Pitcher, 6 Taunt. 219, it was determined, that an executor of a testator, possessed of real and personal estate, clothed with a trust to pay debts, and to lay out money for the benefit of the testator's children, and with a power to sell freehold lands in fee, but taking no beneficial interest under the will, was a good attesting witness.]

claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil."

Section 2. "In case by any will or codicil any lands, tenements, or hereditaments, shall be charged with any debt or debts; and any creditor, whose debt is so charged, shall attest the execution of such will or codicil; every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act."

Section 6. "Provided always, that the credit of every such witness so attesting the execution of any will or codicil, in any of the cases in this act before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the Court and the jury, before whom any such witness * shall be examined, or his testimony or attesta- *61
tion made use of, or of the court of equity in which the testimony or attestation of any such witness shall be made use of; in like manner to all intents and purposes as the credit of witnesses in all other cases ought to be considered and determined."† [1]

[† After some conflict of opinion and authority, it seems now settled, that the above statute does not apply to wills merely of personal estate. In Lees *v.* Summersgill, 17 Ves. 508, Sir William Grant, M. R. held (1817) that the above statute did extend to all wills, and that a legacy given by a will merely of personal estate to a person who was a subscribing witness was void; but in Brett *v.* Brett, 3 Add. Ecc. Rep. 210, subsequently affirmed (May, 1827,) by the High Court of Delegates, 1 Hagg. Ecc. Rep. 58, n. (a.) it was decided otherwise, namely, that the statute *did not* apply to such wills. The latter opinion has been followed by Sir John Leach, M. R., in Emanuel *v.* Constable, (June, 1827,) 3 Russ. 436, and by Sir Launcelot Shadwell, in Foster *v.* Banbury, 3 Sim. 40, (1829.)]

[1] The subject of the statute of 25 Geo. 2, c. 6, respecting the effect of a devise or legacy to an attesting witness, has been legislated upon in almost all the States in the Union. In *South Carolina*, the English statute is of force. Taylor *v.* Taylor, *supra;* [Cannon *v.* Setzler, 6 Rich. 471.] But in *Tennessee*, it is not. Gass *v.* Gass, 3 Humph. 278. Generally speaking, the statute provisions here are the same as those of the English statute, in the sections quoted in the text; with a few modifications, which will be mentioned.

In the States of *Maine*, *Virginia*, *Ohio*, *Kentucky*, *Mississippi*, and *Alabama*, the provision is universal in its terms, annulling the title of the attesting witness, under the will, in the case of "*all* devises and bequests"—"*any* devise," &c.—"*a* devise, &c., made to him. But whether this language is to be applied to fiduciary devises, or those not beneficial in their nature, is not known to have been judicially determined. In the

46. Two celebrated cases have been decided respecting the competence and credibility of witnesses to a will. The first is that of Wyndham *v.* Chetwynd, in the Court of King's Bench; and the second is that of *Doe ex dem.* Hindson *v.* Kersey, in the Court of Common Pleas.[1] But as they relate to wills made before this statute, it is unnecessary to state them. (*a*)

47. A *legatee* may be a witness against a will, because he swears against his own interest, and so is the strongest evidence. (*b*)

48. An *infamous person* is not a competent witness to a will; and therefore it was held, in a modern case, that a person who had been convicted of stealing sheep was not a competent witness to a will; for it was the crime that created the infamy, and took away a person's competency, not the punishment. (*c*)

49. An estate in fee on the determination of a life-estate was *devised to the wife* of A. B. A. B. was one of the three witnesses who attested the will. Testator died in 1779, and the wife of A. B. in 1813, before the life-estate was determined. A case was sent by the M. R. for the opinion of the K. B., and they certified their opinion to be that the will was not duly executed, so as to pass real estate to A. B.'s wife. (*d*)

50. A *devise must also be published;* that is, the devisor must

(*a*) 1 Burr R. 414; 4 Burn's Ec. L. p. 97; Ed. 1824.
(*b*) Oxendon *v.* Penerice, Salk. 691. (*c*) Pendock *v.* Mackender, 4 Burn's Ecc. Law, 95.
(*d*) Hatfield *v.* Thorp, 5 Bar. & Ald. 589. Holdfast *v.* Dowsing, 2 Str. 1253. 4 Burn's Ecc. Law, 97. Carthew, 514.

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other States, the rule is applied in terms to "*beneficial*" devises and interests alone, as in the English statute.

A qualification to this rule is admitted in several States, by limiting its application to cases, where there is not the statute-number of competent witnesses to the will, exclusive of the devisee; or, as it is expressed in some of the statutes, where the will cannot otherwise be proved. This limitation is found in the statutes of *Maine, Massachusetts, New Hampshire, Vermont, Connecticut, Virginia, Ohio, Michigan, Kentucky, Indiana, Illinois, Missouri, Mississippi, Arkansas,* and *Alabama.*

In *Vermont,* this rule, annulling the gift to a witness, is further limited to cases where the witness is not an heir at law to the testator. But in *New York, Virginia, Ohio, Michigan, Kentucky, Indiana, Illinois, Mississippi, Missouri, Arkansas,* and *Alabama,* if the witness would be entitled to a share of the testator's estate if there were no will, the statutes provide that he shall still receive that share, but not beyond the value intended to be given him by the will. [Caw *v.* Robertson, 1 Selden, (N. Y.) 125.]

[1] The case of Doe *v.* Kersey, and the able argument of Ld. Camden, *in extenso,* may be found in a note in 1 Day, Rep. p. 41–88.

do some act, from which it can be concluded that he intended the instrument to operate as a will or devise. And Lord Hardwicke has mentioned a case, where, upon a trial at bar in the Court of K. B. the question was, whether the testator had published his will, for there was no doubt of his executing it in the * presence of three witnesses, or of their having attested it in his presence; which showed that publication was, in the eye of the law, an essential part of the execution of the will, and not a mere matter of form. (*a*) *62

51. The words, "*signed and published* by the said A. B. as and for his last will and testament," are a sufficient publication; and the *delivery* of a will, as a deed, has been also held to be a sufficient publication. (*b*)

52. A will was *delivered* by a testator as his act and deed; and *the words* "*sealed and delivered*" were put above the place, where the witnesses were to subscribe. It was adjudged, that this was a sufficient publication. (*c*) [1]

(*a*) 3 Atk. 161. (*b*) Peate *v.* Ougly, 1 Com. R. 196.
(*c*) Trimmer *v.* Jackson, 4 Burn, Ec. L. 116. See Ward *v.* Swift, 1 Cr. & Mee. 171. *Supra*, Vol. IV. p. 192.

[1] No formal and separate act of publication is necessary, unless it is made so by the *express* language of a statute. It is sufficient, if it appears that the testator intended the transaction as a testamentary act; Warren *v.* Postlethwaite, 9 Jur. 721; 2 Colly. Ch. Ca. 108; and this may be inferred from circumstances; Wallis *v.* Wallis, 4 Burn's Ecc. L. 114; no form of words being requisite. Maberly *v.* Sison, 1 Jur. 558. Attestation of *delivery* has been held equivalent to attestation of publication. Ward *v.* Swift, 1 Cr. & M. 175. So, the attestation of signing, sealing, and delivery has been deemed sufficient. Curtels *v.* Kenrick, 3 M. & W. 461. So, publication to *one witness* only. White *v.* British Museum, 6 Bing. 310. So, the act of writing, signing and attesting a will. Ray *v.* Walton, 2 A. K. Marsh. 73; Black *v.* Ellis, 3 Hill, S. Car. Rep. 68. And see Lempriere *v.* Valpy, 5 Sim. 108; Moodie *v.* Reid, 7 Taunt. 355; 4 Mad. 566; Simeon *v.* Simeon, 4 Sim. 555; Jones *v.* Hartley, 2 Whart. 103; 2 Greenl. Evid. § 675, and cases there cited; 4 Kent, Comm. 515; Brinckerhoff *v.* Remsen, 8 Paige, 488; 26 Wend. 325; Swift *v.* Wiley, 1 B. Monr. 118; [Verdier *v.* Verdier, 8 Rich. S. C. 135. The formal execution of a will is held in Delaware a publication. Smith *v.* Dolby, 4 Harring. 350.]

In the case of a will, made under a power explicitly requiring a publication, greater strictness has been held necessary. See Allen *v.* Bradshaw, 1 Curt. 110; Moodie *v.* Reid, *supra*.

In *New York*, *New Jersey*, and *Arkansas*, a distinct act of publication is made necessary, by statute. *Supra*, § 14, note.

On the general subject of publication, Gibbs, C. J., in the case of Moodie *v.* Reid, *supra*, expressed his opinion in the following terms:—"A will, as such, requires no publication; be publication what it may, a will may be good without it. (See Powell

53. It has been held, in several cases, which will be stated hereafter, that where a person, by a will duly attested, charged his lands with the payment of his debts and legacies, a legacy afterwards given by a codicil, not duly attested according to the Statute of Frauds, but sufficient to pass personal estate, would be good. From which it was concluded, that a person might, by means of a will duly executed, *empower himself to make a future disposition of lands, by another instrument, not duly executed.* This doctrine, if established, would have been attended with the most serious consequences; for, as Mr. Fearne observes:—"If a man might, by a will duly attested, devise his lands upon such trusts as he should appoint by any other instrument, it would in effect amount to a repeal of the Statute of Frauds, in respect to the solemnities of testamentary dispositions of lands. A man would have nothing to do but, on his coming of age, to make one general repeal of that statute, in regard to himself, by devising his whole real estate to some nominal persons, and their heirs, upon such trusts, &c. as the testator should afterwards by any writing appoint; and he might, by reference to such repealing

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on Devises, 54, *et seq;* 1 Roberts on Wills, chap. 1, sect. 1; 1 Mass. Rep. 257; Swett, et al. *v.* Boardman, and note.) But here the power is to be exercised by a will signed and published. Therefore there must be some publication here; the will must be signed, published, and attested; and there must therefore be some attestation here, of signing and publication. Though the most respected late Chief Justice of this Court differed from the other Judges, in Wright *v.* Wakeford, it is established by that case, that the witnesses must attest every thing that is necessary for the execution of the power. Here the witnesses have clearly attested the signing; the question is, whether they have attested the other formality, of publication, in attesting and signing. If the act of the testatrix, in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it, attests her publication also, because they attest that by which she publishes it. I called on the bar to say what publication was; I do not wonder that I had no answer; for though the parties used the term publication, it is a term, in this sense, unknown to the law. I know what publication is, if spoken of many things; as for instance of a libel. I know what an uttering is; if a man puts forth base money in certain cases, it is an uttering; but I do not know what the publication of a will is. I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will. I throw this out, that it may not be supposed, that if our decision should be adverse to that which has been argued, it is therefore contrary to the cases that have been decided in this Court." See 7 Taunt. 561, 562.

The *time* of publication of a will is ordinarily referred to its date; but this is not conclusive; it may be proved *aliunde* to have been made at a subsequent day. Bagwell *v.* Elliott, 2 Rand. 190.

will, at any time make a testamentary disposition of the estates, without the least attention to the ceremonies required by the statute. This would let in all the inconveniences of frauds and perjuries intended to be prevented by the last-mentioned statute, in regard to testamentary dispositions of land; nay, the legal absolution might possibly be extended to the Statute of Wills as well as that of Frauds, &c., and by considering the first intermediate will a sufficient compliance, as well with the requisition of writing, required by one statute, as *of the *63 ceremonies of execution by the other, a parol appointment of the trusts might be attempted, under a power worded for that purpose, in the original absolving will." (*a*)

This opinion of Mr. Fearne has been established as good law, by the following case.

54. Samuel Hill, by a will duly attested, devised his freehold estates to five trustees, and the survivors and survivor of them, their and his heirs and assigns, to the use of his granddaughter for life, remainder to her first and other sons in tail male, remainder to her daughters as tenants in common in tail general, remainder unto or for the use of such person or persons, and for such estate or estates, as he, by any deed or instrument to be executed by him, and attested by two or more credible witnesses, should direct, limit, or appoint. The devisor, by a deed poll dated the day after, under his hand and seal, attested by two witnesses, after reciting his will, in pursuance of the power thereby reserved to him, limited and appointed his estates, after the death of his granddaughter, and failure of her issue, to the first and other sons of his son, &c. A question was referred by the Court of Chancery to the Court of King's Bench, whether the two instruments, taken together, were, at the time of the death of the devisor, sufficient to pass any estate or interest in the freehold premises, not given by the first instrument. (*b*)

The Court of King's Bench certified their opinion, that the two instruments taken together were not sufficient to pass any estate or interest in the freehold premises, not given by the first instrument; on the ground that the second instrument was a deed, and not a will.

The cause coming on for further directions, Lord Lough-

(*a*) Fearne, Opin. 435.

(*b*) Habergham *v.* Vincent, 5 Term R. 92.

borough called to his assistance Mr. J. Buller, and Mr. J. Wilson, and they were all of opinion that the second instrument was testamentary; but not being attested according to the Statute of Frauds, could have no operation or effect. (*a*)

55. The Statute of Frauds requires, that all devises of lands or tenements shall be executed in the manner above stated; and it has been determined that all devises by which terms for years, or other interests arising out of lands, are created, or by which *powers to sell or charge lands* are given, are *within the statute.* Therefore, where an estate is devised for a term of years, or a sum of money is given originally out of land, a will con-
64* taining *such a charge must be executed in the manner prescribed by the statute; because it is the same as a devise of the land, since the term of years is an interest in the land, and money thus given can only be raised by a mortgage or sale of the land. (*b*)

56. There is one *exception to this rule*, which has been already mentioned, namely, where a will duly executed according to the Statute of Frauds, contains a general charge on the testator's lands, in aid of his personal estate, it will extend to legacies given by a *subsequent will or codicil, not duly attested.* (*c*) †

57. Richard Boughton, by a will, executed according to the Statute of Frauds, gave his sister £400, and the remainder of his estate, after payment of his debts and legacies, to his brother. By another will, not duly attested, he gave to the same sister £100, and to another sister £400, and all the rest of his estate, real and personal, to his brother. One of the questions in this case was, whether the legacies, given by the second will, could be considered as charged upon the land, by the first will; the

(*a*) 2 Ves. 204. *Vide*, Rose *v.* Cunynghame, *infra*, s. 60. (*b*) 2 Atk. 272. 2 Vez. 179.
(*c*) Hyde *v.* Hyde, 1 Ab. Eq. 409.

[† Lord Eldon, in the case of Wilkinson *v.* Adam, 1 Ves. & B. 446, observes, in reference to a charge of legacies by a will with three witnesses, "though it is settled that legacies given by an unattested paper, will be included in that charge, that has been met at least with this symptom of disapprobation, that it is remarked as a solitary case; and if by a will duly attested the devisor directs an estate to be sold, though he could have exhausted that fund by legacies, he could not by a will unattested, give away any part of it." See also Hooper *v.* Goodwin, 18 Ves. 156. Upon the subject of legacies charged upon real estate, see 1 Roper's Legacies, c. 12, ed. 1828.]

testator having subjected his real estate to the payment of his debts and legacies. (*a*)

Lord Hardwicke.—"I am of opinion, that the lesser legacies, given by the second will, are chargeable upon the lands devised by the first. Consider them first as new original legacies; the second will is a complete disposition of his personal estate; and if a man charges his lands by his will, with all his debts and legacies, and afterwards gives other legacies by a codicil, not properly executed within the Statute of Frauds, the new legacies would affect the land, notwithstanding the insufficiency of the codicil to pass lands; because this is considered as done in execution of a power which the testator had reserved to himself, by charging his lands with his debts and legacies in general; according to Masters *v.* Masters, 1 P. Wms. 421. And there is no more inconvenience in this, than in a charge upon his lands * of all his debts; where debts contracted at any *65 time after, during his life, would certainly affect all his lands. So if a man makes two wills, one of his real, the other of his personal estate, legacies given by the second will, though executed only so as to pass the personal estate, would still affect the land, if there was a general charge of his debts and legacies upon the land, by the first. But in our case, the second legacies are not new legacies, they are but a modification of the former; and had they been given in the same manner as the first, there could not have been a doubt of this matter. The difficulty arises only from the difference of interests given by the one will, and the other; but still it is only an alteration of the intent of the testator as to the *quantum*, and a modification of the former; they remain part of the former, and the revocation but *pro tanto*." (*b*)

58. This doctrine is founded on the principle, that a charge of debts or legacies amounts to no more than making the real estate auxiliary to the personal; or in other words, directing it to be converted into, and applied as part of the testator's personal estate, and in aid thereof. And Mr. J. Buller, in the case of Habergham *v.* Vincent, cited the case of the Duke of Bolton *v.* Williams, in which a term for years was created by a will duly attested, for payment of all such legacies as the testator should

(*a*) Brudenell *v.* Boughton, MS. Rep. 2 Atk. 268. (*b*) *Vide* 5 Term R. 95.

mention in a codicil. He afterwards made a codicil unattested, giving legacies and annuities; the annuities were held to be legacies. And Lord Loughborough observed, that all the cases of this kind were not cases of a primary, substantive, and independent charge upon the real estate, but a charge upon it in aid of the personal, which was primarily charged; and that the Statute of Frauds did not prevent a man from creating, by will, a fluctuating charge upon real, in aid of personal. (*a*)

59. But if a person, by will duly attested, charges his real estate with such legacies and annuities as he shall afterwards give and charge upon that estate, whether attested or not, a charge by an unattested codicil will not be good.

60. A person by his will duly executed, devised to trustees, their heirs, executors, &c. a plantation in the island of Grenada, upon trust, by and out of the produce thereof, to pay off debts and incumbrances; and also to pay off and discharge all such annuities, legacies, or bequests, as he should give by his will, or by any codicil or codicils thereto, or by any writing or
66 * writings at any time or times after signed by him, or in his own handwriting, whether witnessed or not. (*b*)

The testator, by an unattested codicil, gave an additional annuity of £100 to his wife, out of his Grenada estate; and the question was, whether this codicil was sufficient to charge the Grenada estate.

Sir W. Grant, M. R.—"The ground, upon which it is contended that this additional annuity of £100 might be good as a charge upon the Grenada estate is, that the estate being once charged with all legacies and annuities, the testator may afterwards give either legacies or annuities by an unattested codicil. That the rule is so settled in many cases; and if this were that case, unquestionably it is too well established to be now disturbed; though it may be doubted, whether it is perfectly consistent with the Statute of Frauds; for in effect the testator does dispose of his land by an unattested codicil, when he is at liberty to burden it with legacies so given. However, in this case, the testator does not charge the Grenada estate with legacies or annuities generally, but with such only as he shall afterwards give and

(*a*) Fearne's Op. 434. 8 Ves. 495. 2 Ves. 231. Smart *v.* Prujean, 6 Ves. 560.
(*b*) Rose *v.* Cunynghame, 12 Ves. 29

charge upon that estate; so that, as legacy or annuity, it is not at all chargeable upon the estate; but it is as he has thought fit, by an unattested codicil, to declare, that it shall be a charge upon the estate. The reason that debts and legacies may be a burden upon the estate, is, that they constitute a fluctuating charge. It is impossible previously to ascertain what debts a man may owe at the time of his death; and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think fit, or his fortune shall enable him to give. The Court has therefore said, that when he has, by a will duly executed, charged debts and legacies, it is only necessary to show that there is a debt, or that there is a legacy, in order to constitute a charge: for the moment that character is shown to belong to the demand, you show that it is already charged upon the estate. Then an unattested instrument is itself perfectly competent to give a legacy; and when given, you predicate of it, that it is a legacy; and then the charge immediately attaches, by virtue of the executed will. But here, the testator says, he does not now determine that all annuities, and all legacies he shall hereafter give, shall be charges; but only that if at some future period he shall think proper to declare legacies and annuities *to be charges upon this real estate, then the trustees *67 shall pay them out of the real estate. Therefore not only the legacy is to be found, but also the will of the testator, to make it a charge upon this estate; without which it is not a charge. That is only an attempt to reserve, by a will duly executed, a power to charge by a will not duly executed. It is the case of Habergham *v.* Vincent. (*a*) It might as well have been contended in that instance that there was an adoption into the will of that future instrument. But the opinion of the Lord Chancellor and the Judges was, that it was not competent to a man to give himself such a power; viz., a power to dispose of land by an unattested instrument. That is the reservation this testator attempts to make; for unless he thinks fit, when he makes his codicil, to declare his intention that his land shall be charged with the legacy or annuity, it shall not be charged. Then it is through the medium of an unattested instrument that it is to be a charge upon land; and that cannot be, within that case."

(*a*) *Ante*, s. 54. Bonner *v.* Bonner, 13 Ves. 379. Hooper *v.* Goodwin, 18 Ves. 156.

61. Although *a trust estate* is now what a use was before the statute 27 Hen. VIII. yet it is settled that it *can only be devised by a will executed according to the Statute of Frauds.*

62. Lands were conveyed to trustees and their heirs, to the use of them and their heirs, in trust, after raising certain sums of money, to convey the premises to J. S. and his heirs. J. S. by a will, attested by two witnesses only, devised his trust estate to J. N. (*a*)

Lord Macclesfield said, there could be no question but that a trust of an inheritance could not be devised, otherwise than by a will duly attested by three witnesses, in the same manner as a legal estate; for if the law were otherwise, it would introduce the same inconveniencies as to frauds and perjuries, as were occasioned, before the statute, by a devise of a legal estate.

63. An *estate in mortgage*, though only held as a pledge for securing the repayment of money borrowed, *can only be devised by a will executed according to the Statute of Frauds.* The same rule applies to *an equity of redemption*, which is considered as real property, and similar to a trust estate. (*b*)

64. Some modern writers have asserted, that where a mortgagee disposes of money due to him on a mortgage, by an unattested will, the legal estate in the lands, comprised in
68* the * mortgage, will pass. I can find no authority for this position; and I apprehend that nothing more than the money would pass, with a right in equity to call on the heir of the mortgagee for a conveyance of the land. (*c*)

69* * 65. As *terms for years* already created were disposable by testament before the statutes of Wills, they *are not com-*
70* *prehended * within the Statute of Frauds*, and may therefore be *disposed of by any kind of will or testamentary disposition;* but it has been already observed, that a term for years in lands cannot be created by a will, which is not *executed according to the Statute of Frauds.*

66. All wills relating to terms for years must be proved in the ecclesiastical courts, having jurisdiction over the place where the lands lie; for otherwise they will have no effect as to the terms.

67. If, however, a *term of years becomes attendant on the in-*

(*a*) Wagstaff *v.* Wagstaff, 2 P. Wms. 258. 3 Atk. 151.
(*b*) Tit. 15, c. 2. (*c*) Idem.

heritance, it is then considered as part of the inheritance, not a chattel real, and *can only be disposed of by such a will as would pass the inheritance.* (*a*)

68. Thus, where Edward Whitchurch, having purchased a term in the name of a trustee, and the inheritance in his own name, by a will not executed according to the Statute of Frauds, devised the premises to the son of a younger brother; the heir at law of the testator brought her bill in chancery, in order to compel the executor and devisee to assign over the term to her. It was objected for the defendants, that the executor had assented to the devise; and that the will, though not attested by three witnesses, was good at law to pass the term. But decreed, that as this was a term which would have attended the inheritance and in equity have gone to the heir, and not to the executor, in which respect it was to be considered as part of the inheritance, so the will, which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term. Though it was true, such a will as in the present case would be sufficient to pass a term in gross, yet should it not pass the trust of a term attendant on the inheritance, nor consequently the term itself. (*b*)

69. A *will made in a foreign country*, of lands situate in England, must be executed in the same manner, and attested by the same number of witnesses as a devise of lands made in England. (*c*) [1]

(*a*) Tit. 12, c. 3. s. 29.

(*b*) Whitchurch *v.* Whitchurch, 2 P. Wms. 236. 2 Atk. 72.

(*c*) Coppin *v.* Coppin, 2 P. Wms. 293. (2 Greenl. Evid. § 670. Countess de Zichy Ferraris *v.* Marq. of Hertford, 3 Curt. 468. Ld. Nelson *v.* Ld. Bridport, 8 Beav. 547. 10 Jur. 1043. Croker *v.* Marq. of Hertford, 4 E. F. Moo. 339.)

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[1] This rule, that a devise of lands, to be valid, must be made according to the *lex rei sitæ*, is enacted in *Maine, New Hampshire, Delaware, Rhode Island, Indiana,* and *Missouri.* In several other States, a contrary rule is adopted, by which lands in those States may pass by a will, made in a foreign State, in the form required by the law of the place where it was made. But to have this effect, the foreign will must have been first proved abroad, and then be admitted, by a certified copy, to be filed and registered in the State where the lands lie. Such is the rule, as expressly enacted, in *Massachusetts, Vermont, Florida, Michigan, Illinois, Louisiana,* and *Arkansas.* Whether such is the legitimate effect of the rule adopted in other States, as in *Virginia, Ohio, New Jersey, Kentucky, Tennessee, Mississippi* and *Alabama,* where a copy of the foreign will being duly proved abroad, may be allowed by the Court of Probate, and admitted to be

70. It has been a common practice, for a long time, where a title depends upon a will, to *prove the execution* of it *per testes* in chancery. But Lord King has said, that this is not absolutely necessary, to make out the title, any more than it would be to prove the execution of a deed in equity, by which the estate was settled from the heir at law, after the ancestor's death.

71 * The will *prevents and breaks the descent to the heir, as much as a deed; and the hands of the witnesses to the will may be as well proved as those to a deed. Now, as it would be no objection to a title, if a modern deed, on which the title depended, was not proved in equity; why should it be so in the case of a will, where the same appears to be duly attested by three witnesses, whose names are mentioned to have been subscribed in the presence of the testator? (*a*)

(*a*) Colton *v.* Wilson, 3 P. Wms. 192. Sug. V. & P. 369, Ed. 9. Fearne's Opin. 234.

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recorded, *quære.* See Dublin *v.* Chadbourn, 16 Mass. 433; Bailey *v.* Bailey, 8 Ohio, 239; Mease *v.* Keefe, 10 Ohio, 362; 1 Jarm. on Wills, p. 1, 2, note by Perkins; Maine Rev. St. 1840, ch. 107, § 20; Mass. Stat. 1843, ch. 92; [Bayley *v.* Bailey, 5 Cush. 245;] N. Hamp. Rev. St. 1842, ch. 157, § 13; R. Isl. Rev. St. 1844, p. 237; Verm. Rev. St. 1839, ch. 45, § 24; Del. Rev. St. 1829, p. 557; Ind. Rev. St. 1843, ch. 30, § 51; Misso. Rev. St. 1845, ch. 185, § 35; Flor. Thomps. Dig. p. 194; Mich. Rev. St. 1846, ch. 68, § 21–24; Illinois Rev. St. 1839, p. 688; Louis. Civ. Code, art. 1589; Ark. Rev. St. 1837, ch. 157, § 36; Tate's Dig. p. 900; Ohio Rev. St. 1841, ch. 129, § 29–33; N. Jersey Rev. St. 1846, tit. 10, ch. 9, § 2; Ky. Rev. St. 1834, Vol. II. p. 1548; Ten. Rev. St. 1836, p. 593; Missi. Rev. St. 1840, ch. 36, § 13, 14; Ala. Toulm. Dig. p. 885. [For the rule in *North Carolina*, see Drake *v.* Merrill, 2 Jones's Law R. 368.]

CHAP. VI.

REVOCATION OF DEVISES.

SECT. 1. *All Devises revocable.*
2. *Express Revocations.*
4. I. *A subsequent Will revoking or inconsistent with a former one.*
8. *Otherwise both Wills are good.*
15. *Two inconsistent Wills of the same Date are both void.*
16. *A second unattested Will revokes Legacies.*
18. II. *A Codicil.*
19. III. *A written Declaration.*
25. *Unless it merely expresses intention to revoke by future Act.*
26. *Or the Revocation proceeds on Mistake.*
27. *Or Deception.*
29. IV. *Cancelling.*
32. *By the Testator, or by his Direction.*
34. *Any Act done with intention to cancel is sufficient.*
38. *An Obliteration of Part does not revoke the Whole.*
43. *Cancelling one Part revokes the other.*
44. *Implied Revocations.*
45. *Marriage, and Birth of a Child.*

SECT. 57. *A Woman's Will revoked by Marriage.*
58. *Alteration of the Estate.*
59. *Alienation to a Stranger.*
62. *Contract for Sale.*
69. *An intended Alienation.*
71. *Alienation to the Use of the Testator.*
75. *Alienation to strengthen the Devise.*
78. *Fine and Recovery.*
85. *Any Conveyance inconsistent with the Devise.*
88. *Exchange.*
89. *Parol Evidence not admissible.*
92. *A Fraudulent Conveyance not a Revocation.*
94. *Nor an Alteration of the Quality of the Estate.*
100. *Nor the Change of a Trustee.*
103. *Nor a Partition.*
106. *Unless it extends to other Things.*
108. *Revocation of Devise of Lands contracted for, by subsequent Conveyance to Uses to prevent Dower.*
110. *Partial Revocations.*
117. *Bankruptcy.*
119. *Revocations of Leaseholds.*

SECTION 1. ALTHOUGH a devise of lands differs in many respects from a testament or will of personal estate; yet there are some circumstances common to both, one of which is, that *a devise is revocable* * at any time during the *73 life of the devisor; so that although a person should

declare his will to be irrevocable, in the strongest terms, yet he may revoke it; because his own acts or words cannot alter the disposition of the law, so as to make that irrevocable which, in its own nature, is revocable. (*a*)

2. Devises of lands made under the particular customs of boroughs, or by virtue of the statutes of Wills, might have been revoked by words only, without writing; the statutes of Wills giving power to any person, seised in fee of lands, to devise them by writing; but being silent as to revocations. This was remedied by the sixth section of the Statute of Frauds, (*b*) by which it was enacted—"That *no devise* in writing of any lands, tenements, or hereditaments, or any clause thereof, *shall be revocable*, otherwise than by some other will or codicil *in writing*, or other writing declaring the same; or by *burning*, *cancelling*, *tearing*, or *obliterating* the same, by the testator himself, or in his presence, or by his directions and consent. But all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions, in manner aforesaid; or unless the same be altered by some other will or codicil, in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same." [1]

3. Under this statute, there are *four express modes of revoking a will.* I. By a *subsequent will.* II. By a *codicil*, both of which must be *duly attested* according to the statute. III. By an *express declaration in writing*, that the testator means to revoke his will. IV. By *burning*, *cancelling*, *tearing*, or *obliterating* the will.

4. A *subsequent will* operates as a revocation of a former one, in all cases where it contains an express clause revoking all former wills; or where it makes a different and incompatible disposition of the lands devised by the former one.

5. The *intention of a testator* to revoke his will is the *circumstance which constitutes the revocation;* and when that appears

(*a*) Bacon's Max. 19. 8 Rep. 82, a. (*b*) 29 Car. 2, c. 3.

[1] This section of the Statute of Frauds has been substantially enacted in all the United States; except as to the mode of executing the written instrument of revocation. See *infra*, § 19, note.

in a subsequent will, it is sufficient, though such subsequent will should not take effect, from any disability in the devisee. (*a*) [1]

6. Thus where a person devised lands to A B, and afterwards devised the same lands to the poor of the parish of C, which was void, they not having the capacity to take; yet it was held to *be a revocation. So a *devise to a corporation*, though void,[2] was held to be a revocation of a former devise. (*b*) *74

7. In a subsequent case it was held, that a *devise to a Roman Catholic*, who was at that time incapable of taking by devise, should, notwithstanding, operate as a revocation of a former will. (*c*)

8. By the Roman law, a subsequent will operated, in all cases, as a revocation of a former one. *Posteriori quoque testamento, quod jure perfectum est, superius rumpitur.* The reason of this rule was, because the essence of a Roman testament consisted in the institution of an heir, who took the whole property of the testator; so that two wills could never subsist at the same time, as there could not be two distinct owners of the same. *Quicunque testamentum facit, censetur de omnibus bonis disponere, ut non magis duo testamenta simul consistere possint, quam duo domini ejusdem rei in solidum constitui.* But although the law of Eng-

(*a*) (Laughton *v.* Atkins, 1 Pick. 535, 543.) (*b*) 1 Roll. Ab. 614.
(*c*) Roper *v.* Radcliff, 10 Mod. 233.

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[1] It requires the *same capacity to revoke*, as to *make* a will. If therefore, the act of revocation be done when the testator was *non compos*, or insane, it is a nullity, and the will may still be set up, as if the act had not been done, or were a merely accidental spoliation or destruction. Allison *v.* Allison, 7 Dana, 94; Ford *v.* Ford, 7 Humph. 92; O'Neall *v.* Farr, 1 Richard, 80; [Smith *v.* Wait, 4 Barb. Sup. Ct. 28; Rhodes *v.* Vinson, 9 Gill, 169; Plenty *v.* West, 15 Eng. Law & Eq. 234. A became of unsound mind, and while in that state destroyed his will. He recovered, and gave directions for the preparation of another will, to the same effect as the will destroyed, but before this was prepared destroyed himself. Probate was granted of the unexecuted draft of the original will. In re Downer, 26 Ib. 600.

If a second will is made, containing an express clause of revocation of former wills, but does not take effect, by reason of some imperfection in its structure, or want of due execution, it cannot avail as a revocation of the former will; for it is not certain that the testator intended to revoke the first will, except by substituting the second. The subsequent will, in order to have that effect, must first be admitted to probate. Laughton *v.* Atkins, 1 Pick. 535, 543. See also Pringle *v.* McPherson, 2 Brev. 279; Short *v.* Smith, 4 East, 419. [See also Cutto *v.* Gilbert, 29 Eng. Law & Eq. 64.]

[2] Such devise is not universally void. See *ante*, tit. 1, § 40, note; *Supra*, ch. 2, § 20, note.

land has adopted the principles of the Roman law, respecting wills of personal property, yet Lord Mansfield has said, that a devise of lands is looked upon in a very different light, being considered as an appointment of lands to a particular person; from which it followed, that a person might as well dispose of part of his lands by will, as of the whole. (*a*)

9. In consequence of this principle, it has been determined, that where a *second will* has not a *clause of revocation* of all former wills, and does not make any *disposition inconsistent with a former will*, it does not operate as a revocation of such former will, but both remain in force. (*b*) [1]

10. A person devised lands to his youngest son and his heirs. He afterwards married, and by another will in writing, devised the same lands to his wife for life, paying yearly to his youngest son and his heirs a certain rent. Anderson and Glanville held it to be no revocation, but that both wills might stand together, the latter not being contrary to the former; and there being no express revocation; the intention of the testator being only to provide for his wife, and not to alter the devise to his son; for the giving him a rent, showed he intended that he should take the reversion. (*c*)

11. Where a jury found that a testator had made *a second will, the contents of which were unknown*; such second will was held not to operate as a revocation of the first; because it
75* did *not appear, either that it contained a clause revoking

(*a*) Just. Inst. lib. 2. Tit. 17, s. 2. Vinius Comment. Cowp. R. 90.
(*b*) (Brant *v.* Willson, 8 Cowen, 56. Hearle *v.* Hicks, 1 Cl. & Fin. 20. Henfrey *v.* Henfrey, 4 Moore, P. C. Rep. 29.) (*c*) Coward *v.* Marshal, Cro. Eliz. 721.

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[1] Where a testator left three testamentary papers, the first of which disposed of all his property; the second disposed of part only, but began with the words,—"This is my last will and testament;" and the third, which was written on the same sheet with the second, appointed executors "of this my will;"—it was held, that though there were no express words of revocation, and the deceased had disposed of part only of his property, yet the first will was revoked; such being the manifest intention of the testator. Plenty *v.* West, 9 Jur. 458. [See also Nelson *v.* McGiffert, 3 Barb. Ch. R. 158. For cases in which subsequent testamentary papers were held not to amount to a revocation of former ones, see Freeman *v.* Freeman, 27 Eng. Law & Eq. 351; Richards *v.* The Queen's Proctor, 28 Ib. 610.]

The republication of a former inconsistent will, is also a revocation of a subsequent will. Havard *v.* Davis, 2 Binn. 406.

the first will, or that it made a different disposition of the same lands.[1]

12. In ejectment, the jury found a special verdict, that Sir H. Killigrew, being seised in fee, made his will in writing, and afterwards made another will in writing; but as to the contents thereof, they were entirely ignorant; and the Court of King's Bench was of opinion, that the second will was not a revocation of the first. (*a*)

Upon a writ of error in the House of Lords, it was argued for the plaintiff, that the second will could not be considered as a duplicate of the first, but must be deemed a revocation of it; that no will was good but the last; that every will was revocable until death; that the making another will imported a revocation of all former ones, even though it was not so expressly declared. On behalf of the defendant it was contended, that every latter will was not a revocation; for a man might dispose of one part of his estate by one will, and of another part by another will. So, if a man purchased lands after he had made his will, he might make another will of them. Therefore the second will, in this case, might relate to other lands, and be no revocation. The judgment was affirmed. (*b*)

13. In a modern case, this doctrine was carried still further: for where a jury found that a testator had made a *second will, different from the first*, but *without finding in what that difference consisted*, the House of Lords determined, that such second will did not revoke the former one.

14. Upon a special verdict, it appeared that John Lacey, being seised in fee of a set of chambers in Lincoln's Inn, made a will in the year 1748, by which he devised all his real and personal estate to Frances Harwood. That in the year 1756, he made

(*a*) Seymor *v.* Northwortly, Hard. 374. Hitchins *v.* Bassett, 3 Mod. 203. Salk. 592.
(*b*) Show. Parl. Ca. 146.

[1] This rule is applied, even though it is found that the second will was *stolen* from the testator. Hylton *v.* Hylton, 1 Gratt. 161. Or, was destroyed or suppressed by fraud. Jones *v.* Murphy, 8 W. & S. 275. But where the second will is lost or otherwise missing, parol evidence may be offered, to prove its contents. Legare *v.* Ashe, 1 Bay, 464; 1 Greenl. on Evid. § 84, 509, 560; Havard *v.* Davis, 2 Binn. 406. [And where there is a subsequent will, the party offering it has the burden of showing that it expressly revokes the former will and has different contents, and the mere words "this is the last will, &c.," are not sufficient for that purpose. Cutto *v.* Gilbert, 29 Eng. Law & Eq. 64.]

another will, different from the former one, but in what particulars were unknown to them. They did not find that the testator cancelled his second will, or that the defendant had destroyed the same; but of what was become of the said will, the jurors were altogether ignorant. The question was, whether the devise in the will of 1748, to Frances Harwood, was revoked by the will found to have been executed in 1756. (*a*)

*76 Judgment was given in the Court of Common Pleas, that the *will of 1748 was revoked. Upon a writ of error in the Court of King's Bench, that judgment was reversed. (*b*)

A writ of error was brought in the House of Lords, where it was contended, on behalf of the plaintiff, that the title of the heir at law, being a clear substantive title, ought not to be defeated, but by a title equally clear and unexceptionable; that the title of a devisee must be founded on that which is clearly known to be the ultimate intention of the testator; and it was not sufficient that the testator did, at one time of his life, mean to give his estate to the devisee, unless he continued in that intention to the time of his death. The jury had found that the testator had made a second will, executed according to law; and that the disposition made by the testator in his second will, was different from the disposition in his first will; and though the jury said they were unable to ascertain the particulars, yet the finding necessarily imported that they had received sufficient satisfaction, as to the general contents, to enable them upon their oaths to find that, from whence the courts must see, that the testator's intention was generally changed; and consequently that the first will was revoked. That the jury having found that Mr. Lacey did, in 1756, duly execute another will, the same must be taken to subsist at the time of his death, unless a subsequent change of intention appeared; but the jury had excluded the idea of any such change, by declaring that they did not find that the testator had cancelled the second will; and as the jury had not found it cancelled, the Court could not say it was so. By establishing then the first will, which the testator did not mean to die with, it would necessarily follow that the whole of the testator's large fortune would go from his family, to a person

(*a*) Goodright *v.* Harwood, 3 Wils. R. 497. 2 Black. R. 937. Cowp. 87.
(*b*) 7 Bro. Parl. Ca. 489.

for whom, from the year 1756, he never intended it. Wills disinheriting natural heirs, in favor of persons who are strangers in blood, ought not to receive more countenance than the necessity of the occasion requires; and whenever there is evidence of a change of intention in the testator, such wills can never be established to the prejudice of an heir at law. That, it being at least rendered doubtful, by the execution of the second will, whether Mrs. Harwood was entitled to any thing, or if she was, *what* she was entitled to; it became necessary for her, as claiming under a derivative, and not under an original title, to produce the second will, and show her interest under it. That if ever it *should be understood as established in law, that *77 from the bare non-production of a latter will, to whatever cause it might be owing, a former will must at all events be established; it would be an opening to frauds of the most dangerous kind, and be the strongest temptation to devisees in a former will, to exert every artifice to get possession of and suppress the latter instrument, in order to set up the former revoked will.

On the other side it was said, that with regard to the doctrine of revocations, the determination of the House of Lords, in the case of Hitchins *v.* Basset, (*a*) had settled this point of law, viz. that a subsequent independent will of lands is not in its own nature a revocation of a former will, nor will operate as such, unless it contains words expressly revoking the former; or makes a different and incompatible disposition of the same lands. In the present case, the last will was not to be found; its contents were not known; therefore, no express revocation of the former will appeared in it, nor could it be shown that it contained any different or incompatible disposition of the chambers in question. That although it was found by the verdict that the disposition, made by the latter will, was different from that made by the former, yet it was at the same time found to be unknown in what particular that difference consisted; whether it related to lands, or to personal estate only; to the appointment of an executor, or to the *quantum* of a legacy. The most trivial alteration in the most inconsiderable legacy might have occasioned that difference; but there was nothing to prove that it extended to those particular chambers, which were the subject of the question. The mere

(*a*) *Ante*, § 12.

existence of a subsequent will, was not of itself a revocation, nor was any new disposition contained therein a revocation of the former devise of the chambers in question, unless that new disposition affected those very chambers; and therefore, until it could be shown that the different disposition, found by the verdict, extended to those chambers, or that there were express words of revocation of the former will contained in the latter, the devise under which the defendant claimed stood unrevoked by any thing which could be shown.

It was objected, that the claim of a devisee must be founded on the last will of a testator; and that in this case, there being found to be a will, executed subsequent to that in 1748, that in 1748 was not the last will of the testator, and consequently none *could claim any lands under it. But to this it was answered, that the proposition that the claim of the devisee must be founded on the last will of the testator, was fallacious; unless its import was very strictly attended to. It was true the will under which a devisee claims must be the *last* will, in respect to the very lands which were the subject of such claim; but if there were ten subsequent wills, which contained no express revocation of the former will, that former will, *quoad* the subject of such devise, would be the last will of the testator.

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It was, lastly, observed, that should a will which could not be produced, and the contents or effects whereof were entirely unknown, be construed as a revocation of a known subsisting will; such a construction would, in effect, not only overturn the Statute of Frauds, in respect to one of the most material and dangerous species of fraud intended to be provided against by that statute, but would at the same time be striking a most fatal blow at the very root of all testamentary power over lands; for of what use to a man would the power of making a will be, if he could not make that will secure? But it was impossible that any will, however deliberately made, and solemnly executed, could be in any degree secure, if it could be set aside by means so very practicable, as only swearing to the execution of an unexisting will.

After hearing counsel on this writ of error, the following question was put to the Judges:—" Whether on the facts found by the special verdict in this cause, the devise of the chambers in

Lincoln's Inn to Frances Harwood, the defendant in error, by the will of the 16th April, 1748, be revoked or not?" Whereupon the Lord Ch. B. delivered the unanimous opinion of the Judges, that the said devise was not revoked. It was therefore ordered and adjudged, that the judgment given in the Court of King's Bench, reversing the judgment given in the Court of Common Pleas, should be affirmed.

15. It has been held, by all the Judges in the House of Lords, that *two inconsistent wills*, of the *same date*, *neither of which could be proved to be last executed*, were by the common law of England *void for uncertainty*, *so far as they were inconsistent;* and would let in the heir, if no act of the testator, subsequent to the publication of the wills, explained them; so as to reconcile what otherwise would appear inconsistent. (*a*)

*16. It has been already stated, that where a will, duly *79
attested, charges the real estate of the testator with the payment of debts and legacies, a subsequent unattested will or codicil, giving legacies, will be sufficient to pass such legacies. It has been determined upon the same principle, that in a case of this kind, a *second unattested will or codicil* shall be *sufficient to revoke legacies given by the first will.* (*b*)

17. Thus, in a case which has been already stated, one of the questions was, whether the charge, laid on the land by the first will, and the legacies thereby given, were revoked by the second will. (*c*)

Lord Hardwicke.—"By the Statute of Frauds, no land can pass by will, unless the will be executed according to the provisions of that statute. The same of money charged originally upon land; because it is considered in this Court as part of the land, and can only be raised by sale or disposition of the land. It is like a devise of the profits of land, which is a devise of the land itself; and if so, the rule of revocation must be the same, in case of such charges, as in revocations of lands themselves, devised by will. But still there are several revocations not within the statute; virtual revocations, as by parting with or extinguishing the thing given by the will; and wherever that is done by the testator, the devise falls to the ground. These are

(*a*) Phipps *v.* Anglesea, 7 Bro. Parl. Ca. 443. (*b*) *Ante*, c. 5, s. 56.
(*c*) Brudenell *v.* Boughton, *ante*, c. 5, s. 57. MS. Rep.

out of the statute, and remain as they were at law. Selling the land by the testator, is a revocation; or making any other conveyance, inconsistent with the disposition made by the will. Suppose the testator charges his land with a debt, or with a portion of £200 for his daughter, who marries in his lifetime, and he gives her the £200 upon her marriage; this is a revocation of the charge, though not by such instrument, executed according to the form prescribed by the statute. In our case, the words of the will do indeed create a charge upon the land; but that is only upon failure of the personal estate; for the legacies were originally charged upon that, and the land is but a security; and whatever takes away the thing secured, must necessarily free the security. It was insisted, indeed, that the real estate was charged originally by the testator with the payment of his debts and legacies; but plainly it is not, and was designed only for a subsidiary fund to the personal estate; so that if the legacies be revoked, the land is discharged. And the case of Hyde
80 * *v.* Hyde (*a*) *is an authority in point, that where there are two wills, though the latter be not a sufficient revocation of the first, as to the lands within the Statute of Frauds, yet the legacies in the former, which are revoked by the latter, are extinct; and consequently the charge upon the land likewise. And I should have been of this opinion, even if the case of Hyde *v.* Hyde had never happened."

18. II. The *second mode of revoking a will* is by a *codicil, duly executed* according to the Statute of Frauds, which has the same effect, in revoking a devise, as a subsequent will, where it contains express words of revocation, or makes a different disposition from that contained in the will. And it has been stated, that a codicil, though not executed according to the Statute of Frauds, may operate as a revocation of legacies. (*b*) [1]

(*a*) *Infra*, s. 30.

(*b*) Att-Gen. *v.* Lloyd, 3 Atk. 552, S. C. 1 Vez. 32. Lushington *v.* Boldero, Coop. C. C. 216. *Ante*, s. 16.

[1] See, on this subject, 1 Jarm. on Wills, ch. 7, sec. 5, 2d Am. ed. and the notes of Mr. Perkins. [Bosley *v.* Bosley, 14 How. U. S. 390; Snowhill *v.* Snowhill, 3 Zabr. 447; Boyle *v.* Parker, 3 Md. Ch. Decis. 42; Boyd *v.* Latham, Busbee, Law, (N. C.) 365; Collier *v.* Collier, 3 Ohio, (N. S.) 369; Williams *v.* Evans, 18 Eng. Law & Eq. 329; Lainson *v.* Lainson, 23 Ib. 72; Wells *v.* Wells, 23 Ib. 4; Cleoburey *v.* Beckett, 11 Ib. 329; In re Hough's Estate, 6 Ib. 61.]

19. III. The *third mode of revoking a will* is by a *writing, declaring an intention of revoking such will*, signed in the presence of three witnesses. And it is observable, that the Statute of Frauds, (s. 5,) requires that, in devises of lands, the three witnesses should subscribe the will in the presence of the testator. But the clause relating to revocations, (s. 6,) only requires that the devisor should sign in the presence of three witnesses, without requiring that the witnesses should subscribe in the testator's presence. Upon the construction of this clause, it has been held, that although a will may be revoked by a written declaration, without being attested by three witnesses subscribing the will in the testator's presence; yet that a second will, though containing a clause revoking all former wills, shall not operate as a revocation of the first will, unless it is executed in such a manner as to operate as a devise.[1]

Though the codicil to some extent goes to annul the will, yet if it be executed simultaneously with the will, and be the voluntary act of a capable testator, it will not operate as a revocation of the will. Biddles *v.* Biddles, 3 Curt. 458.

A codicil, not expressly revoking a former will of real estate, though professing an intention to dispose of the whole estate in a different manner from the will, yet not doing so in fact, is only a revocation *pro tanto*. Brant *v.* Wilson, 8 Cowen, 56. If the codicil be set aside with the will to which it was attached, on the ground of undue influence, it is no revocation of a will made previous to either of them. O'Neal *v.* Farr, 1 Richards. 80. The rule, in regard to revocation by a subsequent testamentary act, is the same, whether it be a will or a codicil, with the general rule of the Roman law, requiring that the revoking instrument be valid in law. *Tunc* autem prius testamentum rumpitur, cum posterius *rite* perfectum est. Dig. lib. 28, tit. 3, l. 2. So, in regard to the partial alteration of a will, where the act intended to be done by the testator is a complete act, namely, to undo a previous gift, for the purpose of making another gift in its place; if the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all. Locke *v.* James, 11 M. & W. 901. And see Limbery *v.* Mason, 2 Com. 451, 453, and note by Mr. Rose. [An informal addition to a will, after its execution, will not operate as a statutory revocation, where the new matter bears neither upon the contents of the will, nor upon its interpretation. Wickoff's Appeal, 15 Penn. State R. (3 Harris,) 281. See the same case as to the implied revocation of a codicil, where it is not mentioned in a clause of republication, in which prior and subsequent codicils are specified.]

If the codicil be merely for the purpose of substituting a new devisee, in the place of another recited to have died; this is only a conditional revocation, dependent on the truth of the supposition that the other is dead. If that is false, the codicil is void, and the will stands. Doe *v.* Evans, 10 Ad. & El. 228.

[1] Upon this section of the Statute of Frauds, Mr. Jarman makes the following observations: — "Though the Statute of Frauds require that a will which revoked a

20. J. S., by a will executed according to the statute, devised the lands in question to A. Afterwards, the testator published

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devise of freehold lands, should be attested by the same number of witnesses as a will devising such lands, yet, in some particulars, the prescribed ceremonial differed in the respective instances. Thus, a devising will was required to be subscribed by the witnesses in the testator's presence, which a revoking will was not, and a revoking will was required to be signed by the testator in the presence of the witnesses, while a devising will needed not to be signed in their presence; each, therefore, had a circumstance not common to both. This difference, however, (which probably occurred without design,) has been attended with little practical effect; for it seldom happens that a testamentary instrument is executed for the mere purpose of revoking a previous will; and if it contain a new disposition, any revoking clause therein will be a nullity, whether the substituted devise takes effect or not, though for widely different reasons in the respective cases. If the devise with which the clause in question is associated be effective, it reduces the latter to silence by rendering it unnecessary, the new devise itself producing the revocation, so that the efficacy of the will as a revoking instrument cannot, in such a case, become a subject of consideration. If, on the other hand, the new devise be ineffectual, on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause becomes inoperative on another principle, namely, that the revocation is conditional and dependent on the efficacy of the attempted new disposition, and that failing, the revocation also fails; the purpose to revoke being considered to be, not a distinct independent intention, but subservient to the purpose of making a new disposition of the property; the testator meaning to do the one so far only as he succeeds in effecting the same; (Barksdale *v.* Barksdale, 12 Leigh, 535; Eggleston *v.* Speke, Carth. 79, 1 Show. 89; Onions *v.* Tyrer, 2 Vern. 441; S. C. 1 P. W. 343. See also Ex parte Earl of Ilchester, 7 Ves. 348; Kirke *v.* Kirke, 3 Russ. 435. But see Richardson *v.* Barry, 3 Hagg. 249); and it cannot be known that the testator intended to revoke his will, except for the purpose of substituting the other. But if the second devise fails, not from the infirmity of the instrument, but from the incapacity of the devisee to take under it, the prior devise is revoked. Laughton *v.* Atkins, 1 Pick. 535, 543; French's case, 1 Roll. Ab. 614 (*o*,) pl. 5; Roper *v.* Constable, 2 Eq. Ca. Ab. 359, pl. 9; S. C. nom. Roper *v.* Radcliffe, 5 Bro. P. C. (Toml. ed.) 360. See Pringle *v.* M'Pherson, 2 Brevard, 279; Greer *v.* McCrackin, Peck, 301; Howard *v.* Holloway, 7 John. 394; Brooke *v.* Kent, 3 Moore, Priv. Coun. 334;" 1 Jarm. on Wills, [153]–[154] 2d ed. by Perkins. See also Reid *v.* Borland, 14 Mass. 208.

These observations, however, can have but a limited application in the United States. In all the States, composing the American Union in 1845, except Rhode Island, New Jersey, Maryland, Tennessee, Florida, and Arkansas, no will can be revoked by another writing, unless the instrument of revocation is executed with the same formalities as are required for the valid execution of a will. In *Rhode Island, New Jersey,* and *Maryland,* the language of the statutes on this subject is the same as in the Statute of Frauds, 29 Car. 2, c. 3, § 6. See R. Isl. Rev. St. 1844, p. 231; N. Jer. Rev. St. 1846, p. 363; LL. Maryl. Vol. I. p. 371, Dorsey's ed. In *Arkansas* it is merely enacted, that "no will in writing shall be revoked by any subsequent will, codicil, or declaration, unless the same be in writing." Toulm. Dig. p. 884. In *Tennessee,* it is enacted, that "no written will shall be altered or revoked by a subsequent nuncupative will, except the same be in the lifetime of the testator reduced to writing, and read over to him and

another writing *as his last will*, in the presence of three witnesses, revoking all former wills; but the witnesses to the second will did not subscribe their names in the presence of the testator. The second will, not being valid as a devise of lands, the question was whether it was good as a writing, within the Statute of Frauds, to revoke the first will. And the Court resolved that it was not. (*a*)

21. A person, by a will duly attested, devised lands to trustees, to several uses. He afterwards made another will of the same *lands, devising them to other trustees, but to the *81 same uses; and there was a clause in this last will, revoking all former wills; but although it was subscribed by the testator, and attested by three witnesses, yet the witnesses did not subscribe their names in the presence of the testator; upon which the testator's heir claimed the lands. And the question was, whether the last will, being void as a devise of the lands, should yet be a good revocation of the former will. (*b*)

Lord Cowper declared, that if the testator had by his second will barely revoked the first, without declaring by the same act his intention to dispose of his lands to the same purposes to which they were devised by the former will, the second will had been a good revocation of the former, as to the lands devised; but here was a disposition of the same lands, in the second will, to the same purposes as in the first will; which showed he did not mean to revoke his first will, as to the devise of those lands, unless he might by the second will (at the same time that he revoked the former) set up the like devise, so as to take effect by virtue of his second will; and that his second will never being so perfected as to make the devise of the lands therein to be good, the same devise stood unrevoked by the former will. And that

(*a*) Eddleston *v.* Speake, 1 Show. 89. 3 Mod. 258. (Laughton *v.* Atkins, 1 Pick. 535. Short *v.* Smith, 4 East, 419. *Supra*, § 5, note.)

(*b*) Onions *v.* Tyrer, 1 P. Wms. 343. 2 Vern. 741.

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approved; unless the same be proved to have been so done by the oath of two witnesses at least, who shall be such as are admissible upon trials at common law." Car. & Nich. Dig. p. 707, § 14. And in *Florida*, it is provided, that any will may be revoked by another will or codicil, duly executed; or, "by any other writing signed by the testator or testatrix, declaring the same to be revoked, or operating as a revocation thereof by law." Thomps. Dig. p. 192, § 2.

upon the like reason the courts of law had determined with great justice in the cases cited. And it was plain the testator did not mean to revoke his former will by cancelling; but by substituting another perfect will in lieu thereof.

22. In the case of Ellis *v.* Smith, (*a*) one of the questions was, whether the will, not being signed by the testator in the presence of the witnesses, but only acknowledged, was a good revocation under the sixth section of the statute. Lord Ch. B. Parker thought it was, and that a revocation might be by any will executed according to the fifth section of the statute. For the words "signed in the presence of three witnesses, &c.," related only to the preceding words — "any other writing." The clause was to be construed in the disjunctive; viz., either by will, codicil, &c., or by writing signed before three witnesses. And the other Judges were of the same opinion.

23. A declaration by a devisor that he has revoked a particular devise in his will, though reduced into writing, and attested by three witnesses, will not operate as a revocation, unless it be *signed by the testator.*

82 * * 24. A person devised certain estates to his daughters, D. and S. Afterwards the testator, having an intention to revoke the will as to D., directed the following words to be written on his will: — "We, whose names are underwritten, do testify, that the abovenamed A. (the testator) did, the day of the date hereof, publish and declare that the several clauses and devises in his will, any way relating to his daughter D., should cease and be void; she being since married, and her portion paid. In witness whereof we have hereunto set our hands, &c." And the same was subscribed by four witnesses, in the presence of the testator; but he did not sign the same, nor any other person by his direction. Adjudged, that this was not a revocation. (*b*)

25. [But here should be noticed a *distinction* between a declaration in writing of a *present actual revocation*, and a declaration of *intention to do some future act of revocation.* The latter does not amount to a revocation.[1]

As where a person, by a second will, disposing of some prop-

(*a*) *Ante*, c. 5. (*b*) Hilton *v.* King, 3 Lev. 86.

[1] The material distinction between a present actual revocation, and a declaration merely

erty acquired subsequently to the making of his first will, added, "As to the rest of my real and personal estate, I *intend* to dispose of it by a codicil *hereafter to be made* to this my will; it was held by the Court of K. B. that this was no revocation of the first will. (*a*)

26. So again, where a *revocation* of a prior devise or bequest *proceeds upon a mistake*, the revocation will be *void;* as where a testator revokes by codicil a devise to A, he being now dead, and it turns out A is living, the first devise will not be revoked. (*b*)

27. Or, where the revocation *proceeds upon a false impression, originating from a deceit* practised upon the testator. As where a testator revokes a prior devise to A, and devises by a codicil the same estate to B, stating her to be his wife, and it turns out that she was married before, and had a husband living, which facts were unknown to the testator; the first devise would not, it is presumed, be revoked. (*c*)

28. But where the testator merely *expresses a doubt* respecting a fact, and *upon that doubt revokes*, it would seem that the revocation would be *good;* and the case of the Attorney-General *v.* Warde, seems to have been decided upon this principle. (*d*)

In that case, the testatrix had bequeathed a legacy of £300 among such of the children as should be living of E., and by a *codicil bequeathed as follows: "I give to my *83 brother's son, C., the £300 designed for E.'s children, as I know not whether any of them are alive, and if they are well provided for;" Sir R. P. Arden held C. to be entitled, though the children of E. were living. His honor, however, observed, "that if it rested upon her not knowing whether they were living, there would be some reason to contend, that it fell within the case (so often cited from *Cicero de Oratore*) of *pater, credens filium suum esse mortuum, alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est nulla:* but she goes further;

(*a*) Thomas *v.* Evans, 2 East, 488. (*b*) Campbell *v.* French, 3 Ves. 321.
(*c*) See Kennell *v.* Abbott, 4 Ves. 802.
(*d*) 3 Ves. 327. See also Att.-Gen. *v.* Lloyd, 3 Atk. 552. 1 Vez. 32.

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expressive of an intention to revoke, is illustrated in the following cases: Brown *v.* Thorndike, 15 Pick. 388; Ray *v.* Walton, 2 A. K. Marsh. 71; Gains *v.* Gains, Ibid. 190; Jackson *v.* Betts, 9 Cowen, 208; 6 Wend. 173, S. C.; Smith *v.* Fenner, 1 Gall. 170.

that she doubted if they were living, whether they might not be well provided for; and she totally deprives them of that provision. The Court will not inquire whether they are well provided for or not."]

29. The *fourth* mode of revoking a will is by *cancelling*, that is by obliterating or defacing the signature of the testator; or by burning, tearing, or otherwise destroying it. But Lord Mansfield has observed, that cancelling is in itself an equivocal act; and in order to make it a revocation, it *must be shown quo animo it was cancelled;* for unless that appears, it will be no revocation.[1] As if a man were to throw ink upon his will instead

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[1] Any act of reprobation, spoliation, or destruction, done upon the instrument, by the testator, with intent thereby to cancel it, that is, to nullify and destroy its integrity and legal existence as a testament, amounts to what the law terms "*cancellation.*" It must be actually *done*, and not merely intended to be done, but the intention abandoned by dissuasion or change of mind, or otherwise totally prevented. The act may be very slight; such as partially tearing, crumpling it up, and throwing it on the fire, though it were privately rescued and saved by another person. Bibb *v.* Thomas, 2 W. Bl. 1043; Winsor *v.* Pratt, 2 B. & B. 650; Johnson *v.* Brailsford, 2 N. & McC. 272; Dan *v.* Brown, 4 Cowen, 483; Jackson *v.* Betts, 6 Cowen, 377; [White *v.* Casten, 1 Jones's Law R. (N. C.) 197.]

So, tearing off a superfluous seal, is a sufficient act of cancellation. Avery *v.* Pixley, 4 Mass. 460. So, a partial burning of the paper, though ever so slight. Doe *v.* Harris, 6 Ad. & El. 209; so, drawing lines across it. Bethel *v.* Moore, 2 Dev. & Bat. 311. Or, destroying one of the copies, where the will was executed in duplicate. O'Neall *v.* Farr, 1 Richards, 80.

But the act must be *done*, and not merely intended. Thus, where the testator, being blind, directed another person to destroy his will, and being told that it was destroyed, believed it; whereas in fact it was deceitfully preserved entire by that person, no act having been done towards destroying it; this was held no revocation. Boyd *v.* Cook, 3 Leigh, 32; Giles *v.* Giles, 1 Cam. & Nor. 174. [So, where a testator ordered his son to throw his will into the fire, and the son to deceive the father, threw in another paper and kept the will, this was held no revocation. Hise *v.* Fincher, 10 Ired. 139.]

And the intent must be clear and final, the mind of the testator reposing upon it, as a finished act of revocation. If the act of spoliation or destruction is ambiguous, it will be interpreted and determined by the intent with which it was done; and the intent will be ascertained by evidence *aliundè*. Bethel *v.* Moore, *supra;* Jackson *v.* Holloway, 7 Johns. 394; Means *v.* Moore, 3 McCord, 282. It must be the intent of a sound and not of an insane mind. Ford *v.* Ford, 7 Humph. 92. And if the intention is changed, before the destruction or cancellation is completed, the partial destruction will be regarded as a merely casual spoliation, and the instrument will be held still in force. Giles *v.* Giles, *supra.*

If the will be once thus cancelled, it is finally revoked; even though the testator, at the time, intended afterwards to make a new one, but never did so. Lemmer *v.* Lemmer, 7 H. & J. 388; Bohannon *v.* Walcott, 1 How. 336.

If a will is found cancelled or mutilated, among the testator's papers, after his de-

of sand, though it might be a complete defacing of the instrument, it would be no cancelling; or suppose a man having two wills of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would be no revocation of the will: or suppose a man, having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part. It is the intention, therefore, that must govern in such cases. (*a*)

30. A person made a will, and intending to make some alterations in it, sent for a scrivener, and gave directions for another will. The scrivener accordingly drew a draft of another will which the testator signed; and then, thinking he had made a new will, he pulled out the first will, and tore the seals from the first eight sheets of it; which the scrivener seeing, asked him what he was doing; to which he answered, "I am cancelling my first will."—"Pray," says the scrivener, "hold your hand; the other will is not perfected; it will not pass your real estate, for want of being executed pursuant to the Statute of Frauds."

(*a*) Cowp. R. 52.

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cease, it is presumed that it was thus cancelled or mutilated by himself. But if it has been in the possession or power of a person interested to defeat it, this presumption will not arise; and the cancellation must be shown to have been done by the testator. Bennett *v.* Sherrod, 3 Ired. 303. So, if the will cannot be found, the presumption will be, that it was destroyed by the testator; unless it appear to have been in the possession or power of some person, whose interests were adverse to it; in which case, proof of its destruction by the testator, or other evidence explanatory of its absence, will be required. Jones *v.* Murphy, 8 W. & S. 275; Bounds *v.* Gray, 2 Geo. Dec. 136; Minkler *v.* Minkler, 14 Verm. 125; Welsh *v.* Phillips, 1 Moore, 299; [Weeks *v.* McBeth, 14 Ala. 474.]

The cancellation or erasure of part of the will, intentionally restricted to that part, is only a revocation *pro tanto*. Means *v.* Moore, Harp. 314; Brown's Will, 1 B. Monr. 57; Boyd *v.* Martin, 2 Dru. & Walsh, 355. As to alterations made *in pencil*, see *supra*, § 4, note.

An indorsement on the envelope of the will, not signed by the testator, is not deemed an act of revocation. Grantley *v.* Garthwaite, 2 Russ. 90; Lewis *v.* Lewis, 2 W. & S. 455. See further, 2 Greenl. Evid. § 681, 682, and cases there cited; 1 Jarm. on Wills, ch. 7, sec. 2, 2d Am. ed. and notes by Perkins.

[From the bottom of the several pages of a will, the name of the testator had been torn or cut. Part of one page had also been torn off, but was reannexed by a pin. The signature of the testator and of the subscribing witnesses at the end of the will remained. Held, that the will was not revoked entirely or partially. Clark *v.* Scripps, 22 Eng. Law & Eq. 627.]

"I am sorry for that," says he; and immediately desisted
84 * from *tearing off the seals, and died in a short time after, without having done any thing further to perfect the second will, or to cancel the first. (*a*)

It was decreed, that the tearing the seals[1] from the first eight sheets, not being done *animo cancellandi*, was no revocation: and that the seal remaining whole to the last sheet was sufficient; and in strictness it was not necessary that all the sheets should be sealed.

31. In the case of Onions *v.* Tyrer, as reported in Prec. in Cha. 459, it is stated that the testator cancelled the first will, by tearing off the seal. And as to this point, Mr. Cox has taken from the Register's book what Lord Cowper said; which I shall here transcribe.—"And it is plain the testator did not mean to revoke his former will by cancelling, but by substituting another perfect will in lieu thereof, and not otherwise; and therefore the cancelling thereof was but a circumstance, showing that he thought he had made a good disposition by the second will; and in confidence thereof it was done, with no other intent but that the second will should thereby more surely take place." It was decreed that the first will was not revoked. (*b*)

32. A will can only be cancelled *by the testator himself*, or by *some other person in his presence*, and *by his express direction;*[2] so that if a stranger destroys or defaces a will, that does not operate as a revocation of it.

33. A person having disinherited his heir by will, a younger brother of the heir snatched the will out of the hands of the executor, and tore it into small pieces. Most of the pieces, particularly such parts wherein was the devise of the land, were picked up, and stitched together again. A bill was filed to have the will established; and it was decreed, that the devisee should

(*a*) Hyde *v.* Hyde, 1 Ab. Eq. 409. (*b*) *Ante*, s. 21. 1 P. Wms. 344, n. 1.

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[1] A seal is not essential to the validity of the will. *Supra*, ch. 5, § 11, note.

[2] In *New York*, if the act of cancellation is done by another person, "the direction and consent of the testator, *and* the fact of such injury or destruction, shall be proved by at least two witnesses." N. York Rev. St. Vol. II. p. 124, § 34, 3d ed. The statute of *Arkansas* is in the same words, substituting "*or*," for "*and*," and omitting the words "*injury or*." Ark. Rev. St. 1837, ch. 157, § 6.

hold and enjoy against the heir; and he to convey to the devisee; although there was no positive proof that the heir directed the tearing of the will. (*a*)

34. *Any act of a testator*, by which he shows *an intention to cancel* his will, though the will be not actually cancelled, operates as a revocation.

35. One Palin, who had for two months together frequently declared himself discontented with his will, being one day in bed, near the fire, ordered Mary Wilson, who attended him, to *fetch his will, which she did, and delivered it to him, *85 it being then whole, only somewhat erased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as nearly to tear a bit off, then rumpled it together and threw it on the fire, but it fell off. However, it must soon have been burnt, had not Mary Wilson taken it up, and put it into her pocket. Palin did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer. He at several times after said, that was not, and should not be his will, and bid her destroy it. She said at first, so I will when you have made another; but afterwards, upon his repeated inquiries, she told him she had destroyed it; though in fact it was never destroyed, and she believed he imagined it was so. She asked him, when the will was burnt, to whom his estate would go; he answered, to his sister and her children. He afterwards told one J. E. that he had destroyed his will, and should make no other, till he had seen his brother, John Mills, and desired J. E. would tell him so, and that he wanted to see him. He afterwards wrote to Mills, in these terms: "Dear brother, I have destroyed my will which I made; for, upon serious consideration, I was not easy in my mind about that will:" afterwards desires him to come down, "for if I die intestate, it will cause uneasiness." He however died without making any other will. (*b*)

The jury, with whom the Judge concurred, thought this a sufficient revocation of the will; and therefore found a verdict for the heir. A motion was made for a new trial, "and *per totam curiam*, this is a sufficient revocation." A revocation under the statute may be effected, either by framing a new will, amounting to a

(*a*) Haines *v.* Haines, 2 Vern. 441. (*b*) Bibb *v.* Thomas, 2 W. Bl. R. 1043.

revocation of the first, or by some act done to the instrument or will itself; namely, burning, tearing, cancelling, or obliteration by the testator, or in his presence, and by his directions and consent; but these must be done *animo revocandi;* each must accompany the other. *Revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation.* The statute has specified four of these; and if these, or one of them, are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will or instrument itself be totally destroyed or consumed, burnt or torn to pieces. The pres-
86* ent case falls within *two of the specific acts described by the statute. It is both a burning and a tearing; throwing it on the fire with an intent to burn, though it is only very slightly singed, and falls off, is sufficient within the statute. (*a*)

The rule for a new trial was discharged.

36. The *intention to cancel* a will, must, however, *be carried into complete effect*, by the entire destruction of it, otherwise it will remain good.[1]

37. A testator, being angry with one of the devisees named in his will, began to tear it, with the intention of destroying it, and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a bystander, who seized his arms, and partly by the entreaties of the devisee. Upon this he became calm, and having put by the several pieces, he expressed his satisfaction that no material part of the writing had been injured, and that it was no worse. Held, that it was on these facts properly left to the jury to say, whether he had completely finished all that he had intended to do for the purpose of destroy-

(*a*) Pemberton *v.* Pemberton, 13 Ves. 290.

[1] That is, the act of cancellation, intended by the testator, whether it were one of total or only partial destruction of the instrument, must have been done. *Supra*, § 29, note.

Where one made his will, and afterwards made two codicils; and subsequently burnt the will, expressing at the same time his intention not to revoke the codicils, but to make a new will; and died, leaving the two codicils, but without having made any new will;—it was held, that the codicils were entitled to probate, the intention of the testator that they should operate being proved. Clogstoun *v.* Walcott, 12 Jur. 422.

ing the will; and the jury having found that he had not, the Court of K. B. refused to disturb the verdict, and supported the will. (*a*)

38. An *obliteration or alteration of part of a will* does not operate as a revocation of the whole will, but only of the parts obliterated; and the rest will remain good.

39. A, by will in writing, duly attested, devised to his wife a copyhold estate. A, on the day he died, directed B to obliterate some devises, but nothing as to the copyhold; and then caused a memorandum to be written, that he had examined and approved of the will, as so obliterated and altered in his presence by B, but did not republish it in the presence of three witnesses; but directed B to carry it to one to write it fair; and before it was brought back he became delirious. Held to be a good will of the copyhold. (*b*)

40. Robert Sutton made his will, duly attested, and thereby gave all his estates, except a house at Bath, to trustees, in trust to sell, and to place out the money on government or real securities, for the purposes therein mentioned. The testator afterwards made several alterations, obliterations, and interlineations, in different parts of the will, which were not attested; but did not erase or alter the devise to the trustees. * It was certified by the Court of King's Bench, upon a case sent out of Chancery, that the devise of the real estate to the trustees was not revoked. (*c*) * 87

41. A person devised a real estate to *three* trustees and their heirs, upon trust to sell. Some time after, the testator *struck out the name of one of the trustees*, by drawing a pen through it; and the question was, whether the devise to the trustees was revoked by the erasure of the name of one of them, after the execution of the will. (*d*)

Upon a case sent from the Court of Chancery for the opinion of the Court of Common Pleas, Lord Alvanley said, that a revocation by obliteration, would have the same effect which a revocation by any other means would have, and no more; that the devisees must be considered, in a court of law, as joint tenants in fee absolutely; that it was argued, that the revocation of the

(*a*) Doe *v.* Perkes, 3 Barn. & Ald. 489. (*b*) Burkitt *v.* Burkitt, 2 Vern. 498.
(*c*) Sutton *v.* Sutton, Cowp. 812. Winsor *v.* Pratt, 2 B. & K. 650.
(*d*) Larkins *v.* Larkins, 3 Bos. & Pul. 16.

devise, as to one devisee, made an alteration in the interest of the others; but whatever this alteration was, it was not an alteration arising from a new gift, but merely from a revocation. If the remaining devisees were to acquire any estate, which they had not before, something beyond a mere revocation would be necessary. If, therefore, the devisees had been tenants in common, upon the erasure of one name, the remaining two would take no more than two thirds of the estate.

The Court certified, that the devise of the estate to the two trustees, to whom, together with the third trustee, the said estate was devised, as joint tenants, in trust to be sold, was not revoked by the testator's having struck out the name of the third trustee, after the execution of the said will.

42. T. Carwardine duly made his will, by which he devised the premises in question to J. Spillman and E. Aldridge, upon several trusts. The testator afterwards made several alterations in the will, and among others struck out the name of J. Spillman, and introduced the names of J. Wood and J. Adey; and did not afterwards republish his will. The question was, whether it was revoked or not. (*a*)

Lord Ellenborough.—"It has been contended, in this case, that the testator, T. C., has died intestate, as to the premises in question, and that his heir at law is entitled to recover; inasmuch as the obliteration of the name of J. Spillman, one of the devisees in trust, must have been taken to have been done
88 * * *animo revocandi*, and is a revocation of the devise made of the premises: and that it must be also taken that his intention was to have another will, accompanied with the solemnities required by the Statute of Frauds; or at least to have republished the will, obliterated and altered as it is; on which the question arises; and the case in Dyer, 310, *b*, has been relied on. The facts of this case plainly show, that the testator had no object but to change his trustee; and it would be unreasonable, when he has not, by any thing he has done, indicated any intention to dispose of his lands to different purposes than those declared by his will, and when it clearly appears that he meant to disinherit his heir at law, to infer that he designed that his will should become inoperative, and so let in his heir at law, by

(*a*) Short *v.* Smith, 4 East, 419.

what he did; rather than to conclude that he thought he had, by the alterations introduced, made a valid disposition of his estate to the new trustees; and that he had no design to alter his will, except so far as such obliteration and interlineation could effectuate that purpose, by substituting the persons whose names he interlined, in the stead of him whose name was struck out. If such be the case, and so it appears to us, the testator meant no revocation, but by means of that which he, through mistake, supposed to be a valid disposition to others; and had no intention to revoke, by the obliteration he has made, but by an effectual substitution, meant to be made of others in the room of him whose name was so obliterated; and if so, this case must be governed by that of Onions *v.* Tyrer, 1 P. Wms. 343, (*a*) where the intention of the testator not being to revoke his first will by cancelling, but by substituting another perfect will in lieu thereof, Lord Chancellor Cowper, on the same ground, set up a like devise, and held a cancellation of the first will to be no revocation. But in this case, it has been further argued for the defendants, that supposing the obliteration of the name of Spillman to have revoked the devise to him, the heir at law cannot recover, inasmuch as the devise to Aldridge remained unrevoked; and we think there is great weight in this argument; and that there are grounds on which it may be contended, that the effect of the obliteration in this case is, at most, to revoke only the devise as to Spillman, the one devisee in trust, whose name is so obliterated, leaving *it unrevoked as to Al- *89
dridge; the interlineations which were intended to add other trustees, being, for want of a proper publication, inoperative; and therefore, giving its full effect to that obliteration, it would leave the devise to Aldridge in full force, and competent to sustain all the trusts of the will, in exclusion of the heir at law.

43. Where there is a *duplicate of a will*, and the testator cancels the part which is in his own possession, though the other remains entire, yet this *cancelling one part operates as a revocation of the whole will;* for the original and duplicate being but one will, they must stand or fall together; and it may not be in the testator's power to get possession of the duplicate. (*b*)

(*a*) *Ante*, s. 21.

(*b*) 2 Vern. 742. 1 P. Wms. 346. Burtonshaw *v.* Gilbert, *infra*, ch. 7, § 19.

44. Besides the different modes of revoking a will, allowed by the Statute of Frauds, there are certain alterations in the situation of the testator, or in the estate devised, which have been held to operate as *implied revocations* of a devise.[1]

45. It is now fully settled, that where a *man* makes his will, and afterwards *marries and has a child*, these events shall operate as a revocation of his will; because they produce a complete change in the situation, and the duties of the testator.[2]

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[1] [A great change in the pecuniary circumstances of the testator, and some change in his social relations and moral duties, does not amount to an implied revocation of a will. Verdier *v.* Verdier, 8 Rich. (S. C.) 135.]

[2] In several of the United States, the effect of marriage and the birth of a child, upon a prior will, has been definitively settled by statute. Thus, in *Rhode Island*, a will is *ipso facto* revoked "by a marriage of the testator subsequent to the date thereof." R. Isl. Rev. St. 1844, p. 231. [See Wheeler *v.* Wheeler, 1 Rhode Island, 364.] In *Connecticut*, "If, after the making of a will, a child shall be born to the testator, and no provision shall be made in the will for such contingency, such *birth* shall operate as a revocation of such will." Conn. Rev. St. 1849, p. 346, 347.

In *New York*, the enactment is more particular. "If, after the making of any will, disposing of the *whole* estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime, or after his death, and the wife or the issue of such marriage shall be *living at the death of the testator*, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation shall be received." N. Y. Rev. St. Vol. II. p. 124, § 35, 3d ed. In *Arkansas*, *Indiana*, and *Missouri*, the language of the statutes is substantially the same as in New York. Ark. Rev. St. 1837, ch. 157, § 7; Ind. Rev. St. 1843, ch. 30, § 8; Misso. Rev. St. 1845, ch. 185, § 7.

In *Pennsylvania*, if the testator, after making his will, "shall marry or have a child not provided for in such will, and die leaving a widow and child, or either a *widow or child*, though such child be born after the death of the father, every such person, *so far* as shall regard the widow or child, shall be deemed and construed to die intestate." Dunlop's Dig. p. 573, § 15; Coates *v.* Hughes, 3 Binn. 498; Tomlinson *v.* Tomlinson, 1 Ashm. 224.

In *Virginia*, if the testator, having no issue then living, shall make a will, wherein any child he may have is not provided for nor mentioned, and shall at his death leave a child, or leave his wife pregnant of a child which shall be born; the will "shall have no effect during the life of such after-born child, and shall *be void, unless* the child die, without having been married, *and* before he or she shall have attained the age of twenty-one years." Tate's Dig. p. 892. In *New Jersey*, in the like case, the will is declared void; without reference either to the marriage or majority of the child. N. Jer. Rev. St. 1846, p. 368, § 20.

In *South Carolina*, a will is revoked by the subsequent *marriage* of the testator, *and his death, leaving issue.* S. Car. Stat. at Large, Vol. V. p. 107; Jacks *v.* Henderson, 1 Desau. 543, 557.

In *Georgia*, the will is revoked, if the testator shall afterwards marry *or* have a child

46. A person made his will in the time of a former wife, who died without having had any children; and afterwards married a second wife, by whom he had issue the plaintiff. The Court of Exchequer held that the second marriage, and the having issue by that marriage, was a revocation of the will. (*a*) [1]

47. A person made a will in Jamaica, in the year 1764, by which he devised his real and personal estate to the defendant. Afterwards he made another will in England, not duly attested, by which he devised his real and personal estate to his wife, in trust for his son. The Chancellor of Jamaica decreed, that the marriage and birth of a child, and the second will, amounted to a revocation as to the personalty, but not as to the real estate. (*b*)

On an appeal to the Privy Council, Lord Ch. J. De Grey, Lord Ch. B. Parker, and Sir Eardley Wilmot being present, so much of the decree as established the first will, with respect to the real estate, was reversed. And it was declared, that the subsequent marriage and birth of a child were, in point of law, an implied revocation of the first will.

48. *Marriage and birth of a child do not*, however, *in all cases*, * *amount to an implied revocation* of a devise; *90 for these facts only afford *a presumption* that the testator

(*a*) Christopher *v.* Christopher, 4 Burr. 2182.

(*b*) Spragge *v.* Stone, 1 Doug. 35. Amb. 721. (Wilcox *v.* Rootes, 1 Wash. 140. Havens *v.* Van Den Burgh, 1 Denio, 27.)

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born; no provision being made for either wife or child in the will, and no alteration being made in the will, subsequent to the marriage or birth of the child. Geo. Rev. St. 1845, p. 457, § 16.

In *Ohio*, "If the testator had no children at the time of executing his will, but shall afterwards have a child living, or born alive after his death, such will shall be deemed revoked;" unless the child shall have been provided for by some settlement, or in the will, or so mentioned therein as to show an intention not to make such provision; "and no other evidence, to rebut the presumption of such revocation, shall be received." Ohio Rev. St. 1841, ch. 129, § 40.

In *Louisiana*, "the testament falls by the *birth* of legitimate children of the testator, posterior to its date." Louis. Civil Code, art. 1698.

In all the other States, this subject is believed to have been left to the implication of law.

[1] Whether the birth of a child by the first wife, after the making of the will; and after the death of the first wife, a second marriage, but no more children; is a revocation of the will; — *quære*. See 4 Ves. 848; Yerby *v.* Yerby, 3 Call. 334; 1 Jarm. on Wills, 108.

had changed his intention; so that where this presumption is rebutted by other circumstances, the rule will not hold.[1]

49. A bachelor made his will, by which he gave a legacy of £500 to his brother, and legacies to other persons, and devised his real estate to Eliza Close and her heirs. The testator afterwards married Eliza Close, and died without altering his will; leaving her pregnant of a son. The question was, whether this alteration in the testator's situation operated as a revocation of his will. Lord Keeper Wright was clearly of opinion, that an alteration of circumstances might amount to a revocation of a will of lands, as well as of personal estate; notwithstanding the Statute of Frauds, which does not extend to an implied revocation. But that no such alteration appeared here, for no injury was done to any person; and those were provided for, for whom the testator was most bound to provide. And he established the will. (*a*)

(*a*) Brown *v.* Thompson, 1 Ab. Eq. 413.

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[1] This doctrine, that the presumption is not conclusive, has been overruled, upon great consideration, in the cases of Marston *v.* Roe, 8 Ad. & El. 14; and Israell *v.* Rodon, 2 Moore, P. C. R. 51; in the former of which the following points were resolved:—

1. Where an unmarried man, without children by a former marriage, devises all the estate he has at the time of making his will, and leaves no provision for any child of a future marriage, *the law annexes to such will, the tacit condition,* that if he afterwards marries, and has a child born of such marriage, the will shall be revoked. Upon the happening, therefore, of those two events, the will is, *ipso facto,* revoked.

2. Evidence, not amounting to proof of publication, cannot be received in a court of law, to show that the testator intended that his will should stand good, notwithstanding his subsequent marriage and the birth of issue; because these events operate as a revocation, by force of a *rule of law,* and independent of the testator.

3. The operation of this rule of law is not prevented by a provision in the will, or otherwise, for the future wife only; such provision must also extend to the children of the marriage.

4. The provision, also, must be made by the will; the condition, annexed to it by law, so far as relates to the existence or extent of the provision, having reference, in its own nature, to the existing state of things at the time the will itself was made. And it must give to the child a beneficial and not a merely legal interest as a trustee.

Therefore it was held, that the descent of after-acquired lands upon the child, did not prevent the operation of the rule of revocation above stated; especially as the child, in the case at bar, took only a legal estate in trust for the devisee. See also, as to the conclusiveness of the presumption, Goodtitle *v.* Otway, 2 H. Bl. 522, by Eyre, C. J.; Doe *v.* Lancashire, 5 T. R. 58, per Ld. Kenyon; Gibbons *v.* Caunt, 4 Ves. 848; Walker *v.* Walker, 2 Curt. 854.

50. Lord Mansfield has said, that as marriage and the birth of a child only amount to an *implied revocation* of a former will, these may be *rebutted by every sort of evidence, even parol evidence;*[1] and there was no case, in which a marriage and the birth of a child had been held to raise an implied revocation, where there had not been a disposition of the whole estate. (*a*)

51. It has been held by Lord Eldon, that *a second marriage and the birth of children*, the wife and children being *provided for by settlement*, and there being *children by a former marriage*, was a case of *exception from the rule* that marriage and the birth of a child revoke a will. (*b*)

52. It was determined, in a modern case, that marriage, and the *birth of a posthumous child*, operated as a *revocation* of a will of land made before the marriage.

53. A person being a bachelor, devised lands to his nephew, and afterwards married. Upon his wife becoming pregnant, he expressed an intention to revoke his will, and gave directions to an attorney to prepare another will; but died before it was ready. After his death, his widow was delivered of a child, who brought an ejectment against the devisees. (*c*)

Lord Kenyon said, it had been solemnly decided, that marriage and the subsequent birth of a child amounted to a revocation of *a will, made before marriage. Perhaps the *91
foundation of that principle was not so much an intention to alter the will, implied from those circumstances happening afterwards, as a tacit condition annexed to the will itself, at the time of making it, that the party did not intend that it should take effect, if there should be a total change in the situation of

(*a*) Brady *v.* Cubitt, 1 Doug. 31. (Havens *v.* Van Den Burgh, 1 Denio, 27. Yerby *v.* Yerby, 3 Call, 334. Brush *v.* Wilkins, 4 Johns. Ch. 510.) (*b*) Ex parte Ilchester, 7 Ves. 348. (*c*) Doe *v.* Lancashire, 5 Term R. 49.

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[1] This opinion of Ld. Mansfield is overruled in Marston *v.* Roe, 8 Ad. & El. 14; though the decision of the cause itself is approved on other grounds, namely, that the disposition, made by the will, was of part only, and not the whole of the estate; and that the instrument, executed after the birth of the child, operated as a republication of the devise contained in the will. And see Goodtitle *v.* Otway, 2 H. Bl. 516, 522, the observation of Eyre, C. J., upon the case in the text.

If a devise be revoked by a subsequent marriage, with issue, it cannot be again set up, by a subsequent will, not executed with the formalities requisite to pass real estate. Brush *v.* Wilkins, 4 Johns. Ch. 510.

his family. He cited a passage from Justinian's Institutes, (*a*) and one from Vinnius's Comment, (*b*) to show, that by the civil law, if the wife was pregnant, and a posthumous child was afterwards born, the will was utterly destroyed. And this, he observed, confirmed the idea that these decisions did not proceed on the intention of the party, but on a tacit condition annexed to the will itself when made; and that our law also took notice of posthumous children. For these reasons, therefore, standing on former decisions, and not extending them beyond the rule established and incorporated into our law, he was of opinion for the plaintiff. But he disclaimed paying any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the Statute of Frauds, which was passed in order to prevent any thing depending either on the mistake or the perjury of witnesses. But when the act intended to guard against frauds and perjuries, it left the courts at liberty to take into consideration those circumstances which are not liable to prevarication.

Mr. Just. Buller said, the only question was, whether a child in *ventre sa mère*, be or be not in the same situation as a child actually born, and that there was no distinction between them. He had looked into the Register's book for the case of Brown *v.* Thompson, (*c*) where it did not appear that the child was born during the parent's life. That case was first heard before the Master of the Rolls, who decreed a revocation of the will; though that decree was afterwards reversed by Lord Keeper Wright, from the peculiar circumstances of the case. They must take it, he thought, that in that case, the child was not born during the devisor's life; if so, the opinion of the Master of the Rolls went the full length of deciding the case; and he agreed, that that opinion was sound law. The Court was unanimous that the will was revoked.[1]

(*a*) (Inst. lib. 2, tit. 13.) (*b*) (Vin. lib. 2, tit. 13.) (*c*) *Ante*, s. 49.

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[1] But where a man, being married, but without issue, made his will, devising lands to his niece; and afterwards died, leaving his wife pregnant, which fact was *unknown* to him; it was held, that the will was not revoked by the birth of the child. Doe *v.* Barford, 4 M. & S. 10. This case was apparently decided on the ground, that the testator was *ignorant* of the change in his situation and obligations. But taking the revocation to result, in such cases, from an imperative rule of law, as now settled in Mars-

54. Although it be fully established, in the preceding cases, that marriage and the birth of a child operate as an implied revocation *of a devise of land; yet it has never been *92 decided that either of those circumstances singly, as, a subsequent marriage, or the subsequent birth of a child, will have that effect. (*a*)

55. J. Pierson devised all his real estates, to a trustee, in trust, to pay an annuity to Mary Simpson, and in case he should have any children by her, to provide for their maintenance, and to raise £3,000 for them; at the time of making the will the testator had one child by M. Simpson; afterwards he married her and had three children, and died without altering his will. (*b*)

It was held, that the will was not revoked by the subsequent marriage, and birth of children; because there was not that total change in the situation of the family, and that total destitution of provision for those who ought to be the objects of the testator's care and protection, (although the provision was made for them under a different character,) which could vacate the will on the ground of a supposed tacit condition, that it should be void upon a total change in the situation of the testator's family, and a total want of provision for the family so newly circumstanced; or upon the ground of a presumed intention to revoke, according to any rules of law hitherto recognized on this subject. (*c*)

56. It has been determined lately, that where a widower having a son and two daughters, made his will, by which he gave all his real estate in trust for those children, and afterwards married and had other children, his will was not thereby revoked. For such revocation would operate only to let in the eldest son to the whole of the estate, which he had by the will divided between that eldest son, and the other children of the marriage. (*d*) [1]

(*a*) Jackson *v.* Hurlock, 2 Eden, R. 263. (Church *v.* Crocker, 3 Mass. 17, 21.)
(*b*) Kenebel *v.* Scrafton, 2 East, 530. (Marston *v.* Roe, 8 Ad. & El. 14. Sheppard *v.* Sheppard, 5 T. R. 51, n.) (*c*) 1 Ves. & B. 465.
(*d*) Sheath *v.* York, 1 Ves. & B. 390. (Yerby *v.* Yerby, 3 Call, 334.)

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ton *v.* Roe, and Israell *v.* Rodon, *supra*, § 48, note, and not from any presumed change of intention, the propriety of this decision may well be questioned.

[1] And it *seems*, more generally speaking, that a will is not revoked by a second marriage and the birth of children of that marriage, if the estate is so situated that such

57. The *marriage of a woman operates as a revocation of a will, made by her prior to such marriage;* for if the wife dies before her husband, it can have no operation; the making of the will being only the inception of it, as it does not take effect till the death of the devisor. But *if the wife survives her husband, the will is revived,* and takes effect as if she had never been married. (*a*) [1]

58. It was established as a rule of law, long before the Statute of Wills, that *any alteration in the estate of lands devised,* by the act of the devisor, after the publication of his will, operated as an *implied revocation* of such will. This doctrine is founded on three reasons. I. On the favor which the common
93* law *shows in every instance to the heir. II. On a principle already stated, (*b*) that a devisor must not only be actually seised of the lands, at the time when he makes his will, but must also continue to be so seised thereof, till the time of his death.[2] III. Because any alteration of the estate devised is held to be evidence of an alteration in the intention of the devisor.

59. An *actual alienation or disposition of an estate by the devisor,* after he has made his will, operates as a *revocation* of the

(*a*) Forse and Hembling's case, 4 Rep. 61 *a*. 2 P. Wms. 625. Hodsden *v.* Lloyd, 2 Bro. C. C. 534. (*b*) Chap. 3.

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children can take no benefit by the revocation. Sheath *v.* York, *supra.* And see Johnson *v.* Wells, 2 Hagg. 561.

[1] In *Pennsylvania,* it is enacted, that the marriage of a *feme sole* shall be a revocation of her will; and that it shall not be revived by the subsequent death of the husband. Dunlop's Dig. p. 574. In *Indiana, Missouri,* and *Arkansas,* also, the marriage of a *feme sole* is declared by statute to be a revocation of her will. Ind. Rev. St. 1843, ch. 30, § 9; Misso. Rev. St. 1845, ch. 186, § 8; Ark. Rev. St. 1837, ch. 157, § 8. But in *Ohio,* it is enacted, that "a will, executed by an unmarried woman, shall *not* be deemed revoked by her subsequent marriage." Ohio Rev. St. 1841, ch. 129, § 39.

In several other States, laws have been recently made, by which the property of the wife remains her own, and subject to her own control, after the marriage, as it was before; the husband's power over and interest in it, at common law, being taken away; and she also has the power of devising the same. What effect the marriage of a *feme sole* would have upon her will previously made, in those States, is not known to have been judicially determined. See *ante,* ch. 2, § 5, note.

[2] This reason cannot apply in those States where lands may pass by devise, of which the testator had no seisin at the time of making the will; or which were afterwards acquired. See *ante,* ch. 3, § 8, 32, 37, notes.

devise;[1] for in such case, the devisor does not die seised; and his alienation is deemed undoubted evidence of an alteration of intention, in conformity to the rule of the Roman law, from which this doctrine was probably derived; *est enim rei legatæ alienatio species tacitæ ademptionis; quoniam hoc ipso, quod testator rem in alium transfert, recedere à priore voluntate videtur.* (*a*)

60. A person devised all his manors, messuages, and hereditaments to trustees, in trust for his nephew and his issue, in strict settlement. The testator afterwards conveyed an advowson, whereof he was seised at the time of making his will, to trustees and their heirs, and by another deed declared the trust of their conveyance to be to present the son of R. I. (*b*)

It was decreed by Lord Hardwicke, that the conveyance of the advowson was a complete revocation of the devise of it.

61. Eliz. Milner devised a house to her sister Catherine for life, and after her decease, devised the same to trustees, in trust to sell. The testatrix afterwards sold the estate herself. It was decreed that the sale was a revocation, not only of the house, but also of the devise of the money to arise from the sale. (*c*)

62. Even *an agreement or covenant to convey lands*, which have been previously devised by will, *operates in equity*, though not at law, as a *revocation* of such devise.[2]

63. A person devised six houses to his wife; afterwards the testator, by articles, covenanted, in consideration of the marriage of his eldest daughter, to settle a moiety of his real estate on her. Lord King held, that though this was but a covenant, and therefore did not, at law, revoke the will; yet it being for a valuable consideration, was, in equity, tantamount to a conveyance; and consequently a revocation of the will. (*d*)

(*a*) Vin. ad Inst. Lib. 2, tit. 20, s. 12. (4 Kent, Comm. 528–531. Minuse *v.* Cox, 5 Johns. Ch. 441.)

(*b*) Sparrow *v.* Hardcastle, Amb. 224. 3 Atk. 799.

(*c*) Arnald *v.* Arnald, 1 Bro. C. C. 401. See also Newbold *v.* Roadknight, 1 Rus. & Myl. 677.

(*d*) Rider *v.* Wager, 2 P. Wms. 328.

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[1] If the alienation be in fee, it is a revocation, though the grantor reserved a ground rent. Skerrett *v.* Burd, 1 Whart. 246; [Herrington *v.* Budd, 5 Denio, 321.]

[Balliet's Appeal, 14 Penn. State R. (2 Harris,) 451. A mortgage is a revocation of the will *pro tanto*. McTaggart *v.* Thomson, 14 Ib. 149. But if the same land is reconveyed to the testator, and he is the owner of it at the time of his death, the devise will be in force, though the will should not be formally republished. Brown *v.* Brown, 16 Barb. 569.]

[2] [Donohoo *v.* Lea, 1 Swan. (Tenn.) 119.]

64. In a subsequent case, it is said by Lord King, that though a covenant or articles do not, at law, revoke a will, yet if entered into for a valuable consideration, amounting in equity to
94* a conveyance, *they must consequently be an equitable revocation of a will. (*a*)

65. In a modern case, Lord Rosslyn held, that an agreement for a partition operated as a revocation of a devise; and said, that where an estate was devised specifically, and was afterwards sold by the testator, by a contract executory, the estate went from the devisee. And Sir Wm. Grant held, that a covenant to surrender copyhold estates operated as a revocation in equity of a prior will. (*b*)

66. In all cases of this kind, the legal estate passes by the will to the devisee; but the Court of Chancery will compel him to convey it to the person entitled under the equitable agreement. (*c*)

67. [If the *contract for sale* be binding on the testator, it will be equally a revocation of the prior will, though the contract be *rescinded after the testator's decease.*

68. Thus, where a testator, subsequently to the making of his will, contracted to sell certain estates in Virginia and Maryland, and the contract was after his death declared void, by a court of judicature in the United States, on account of the nonpayment of the price by the vendee; on the bill, filed by the devisee against the testator's heir at law, Sir William Grant, M. R., held that the contract, being valid at the death of the testator, was a revocation; his honor observing, that it was not alleged that the vendor had not a title.] (*d*) [1]

(*a*) Cotter *v.* Layer, 2 P. Wms. 623.
(*b*) Knollys *v.* Alcock, 5 Ves. 648. 7 Ves. 558. Vawser *v.* Jeffrey, 16 Ves. 519.
(*c*) 2 P. Wms. 626.
(*d*) Bennett *v.* Lord Tankerville, 19 Ves. 170. (Mayer *v.* Gowland, Dick. 663. Tebbott *v.* Oules, 6 Sim. 40.)

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[1] The doctrine of revocation, contained in this and several of the preceding and subsequent cases, was reviewed by the learned Chancellor Kent, with his usual depth of research, in Walton *v.* Walton, 7 Johns. Ch. 258. In that case, the testator, owning a large tract of land between the Delaware and Susquehannah rivers, devised the same to the plantiff in fee; and afterwards caused the lands to be surveyed and divided into lots for the purpose of sale; and entered into written contracts for the sale of several of these lots, receiving part of the purchase-money, taking securities for the residue; and then died. The bill prayed, among other things, for an account of the moneys received; and was resisted on the ground that by these contracts, the devise

69. Even *an intended alienation* of an estate, previously de-

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to the plantiff was as to these lots, revoked. Upon this branch of the case, the Chancellor's observations will be read by the student with advantage. After referring to the contracts, and remarking that they were binding on the testator, and liable to be specifically enforced in equity, he proceeded to say,—"I entertain no doubt that the devise, so far as those contracts of sale affected the lands devised, was revoked." The case of Knollys *v.* Alcock, 5 Ves. 654, is to this effect: The testator, by will, devised her undivided moiety of her *Berkshire* estate to *M.*, and afterwards, by agreement with her coparcener, contracted to divide their joint interest, and to allot the *Berkshire* estate to *K.* This was held by Lord *Loughborough* to be a revocation of that part of the devise, and the agreement was decreed to be specifically performed. The principle was, that where an estate is devised specifically, and is afterwards sold by the testator by a contract executory, the estate goes from the devisee, and the devise is revoked by the contract of sale. So again, in Williams *v.* Owen, 2 Vezey, 601, the Master of the Rolls observed, that if a man articles for the sale of an estate that he has devised, it is, without doubt, a revocation in equity, though it is not at law, because a court of law cannot look at the articles with a view to a specific performance. In Cotter *v.* Layer, 2 P. Wms. 622, Lord *King* held, that though a covenant or articles to sell or settle the land devised, do not at law revoke a will; yet, if entered into for a valuable consideration, they amount in equity to a conveyance and a revocation. He laid down the same rule in Rider *v.* Wager, 2 P. Wms. 332, and Lord *Loughborough*, in Bridges *v.* Duchess of Chandos, admitted the force and authority of these two cases. So again in the case of Mayer *v.* Gowland, Dickens, 563, the testator devised a certain farm, and then entered into a contract with the defendant to sell it to him for £1,500. It was insisted by the residuary legatees, that the testator meant by the contract, to turn the land into personalty, and that as such they were entitled to it. In this opinion, Lord *Thurlow* concurred, and held that the agreement ought to be carried into execution, and the money arising from the sale to be considered as personal estate.

These cases are entirely sufficient to show the settlement of the rule, that a valid contract, for the sale of lands devised, is as much a revocation of the will in equity, as a legal conveyance of them would be at law. The estate, from the time of the contract, is considered as the real estate of the vendee. We may, therefore, safely conclude, that, as to the lands described in the contracts of sale, set forth in the answer, and which contracts were subsisting at the testator's death, there was a revocation of the devise; and the interest in these lands, and in the contracts relating to them, belongs to the residuary legatees under the will. The more embarrassing question arises as to the lot No. 17, mentioned in the pleadings. This lot was part of the lands devised to the plaintiff, and the testator afterwards contracted to sell it to *S. C. Baldwin*, and received part of the purchase-money. At a subsequent period, this contract of sale was rescinded by the parties to it, and the money paid was credited to *Baldwin* on another transaction, and the testator continued seised of the lot to his death.

"The question is, whether this contract of sale was also a revocation of the will *pro tanto*, seeing that it was afterwards rescinded.

"In Bennet *v.* Lord Tankerville, 19 Vesey, 170, 178, a devise was held to be revoked by a contract of sale, though that contract was rescinded after the testator's death. But in that case, the contract was subsisting when the testator died, and this makes a material distinction between that and the present case.

vised, *which fails* of taking effect *for want of some formality in*

"Inoperative conveyances, which have failed for want of completion, or from incapacity in the grantee to take, have, in some cases, been held a revocation of a will at law. Lord *Kenyon* observed, in Shove *v.* Pincke, 5 Term Rep. 124, that a conveyance, inadequate for the purpose intended, would amount, in point of law, to a revocation, if it showed an intention to revoke the will. A covenant to make a feoffment, and a letter of attorney to make livery, but no livery made, were held, in Montague *v.* Jeffereys, 1 Rol. Abr. 615, to be a revocation of a will as being acts inconsistent with it; and Lord *Hardwicke* and Lord Ch. J. *Alvanley*, sitting in equity, have approved of this construction, as those acts imported an intention in the testator to revoke. 3 Atk. 73, 803; 7 Vesey, 370, 371, 373. So a bargain and sale without enrolment, or a conveyance upon a consideration which happened to fail, or a will not executed according to the statute, or a disability in the grantee to take, are admitted by the same authorities to amount to a revocation. The great question, says Lord *Alvanley*, has been, whether inchoate acts, inconsistent, shall revoke; but in all the cases it is admitted, that if the act gives power to destroy the will, though the act is not done, yet the will is revoked.

"The contract to sell lot No. 17, was binding upon the testator, and was, at the time, a revocation of the will as to that lot, for it was a conveyance in equity, and equity would have enforced it. The estate was, in contemplation of equity, the property of the vendee, and the purchase-money the property of the vendor. The will was revoked because the estate was sold, and because the testator, by that contract, intended to revoke it; and why should a subsequent recovery of the estate, by rescinding the contract, restore the will in equity, without republication, when the taking back of the same estate, by a reconveyance, after a conveyance at law, will not do it? The rules as to revocation of wills are the same in law and equity; and as Lord *Loughborough* observed, in Bridges *v.* Duchess of Chandos, the creation and transmission of estates must be governed by the same law in both Courts. If a will be once absolutely revoked, whether directly or impliedly, it must be gone forever. It cannot be restored without due republication.'

"Without wishing to lose myself in the labyrinth of cases which have arisen on the subject of revocations, and especially after the discouraging picture which Lord Ch. J. *Eyre* gives of many of the cases, as being 'a heap of heterogeneous instances, depending upon different principles, and huddled together without discrimination,' I will look only into a few leading authorities, for the illustration of a strict principle of law, that if the testator afterwards conveys away the estate entirely, though he takes it back again by the same instrument, or by a declaration of uses, it is a revocation, because he once parted with the estate. Either an intention to revoke or an alteration of the estate without such intention, will work a revocation.

"In Dister *v.* Dister, 3 Lev. 108, the C. B. held a devise revoked by a recovery to the uses of the devisor, because the estate was altered, though the testator took back the old use. And the same principle was admitted by the C. B. in Darley *v.* Darley, 3 Wils. 6, because, said Ch. J. *Wilmot*, it must be presumed the testator intended to alter his will; yet, in that case, the testator suffered a recovery, which was absurd and useless, and clearly bad, and without any reasonable meaning to be deduced from it; and Lord *Camden*, on the strength of the opinion of the C. B., held the recovery a revocation of the devise. See Lord *Loughborough's* remarks on this case, in 2 Vesey, 430.

"The opinion of Ch. J. *Trevor*, in Arthur *v.* Bockenham, Fitzgib. 240, is a strong

the instrument,[1] has been held to operate as a revocation of the

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authority on the point, and it is frequently cited as unexceptionably sound. The law, he says, is so very strict, that it requires the interest, which the testator had when he made the will, should continue and be the very same interest, and remain unaltered to his death; and the least alteration of that interest is a revocation of the will. He referred to the case in which a tenant in tail, who has an estate of inheritance, as such tenant, and could dispose of the absolute inheritance and fee by fine and recovery, devises the same, and then suffers a recovery to himself and his heirs; this was a revocation, though he was owner when he made the will, and was no more afterwards, but the estate was altered, and he had another sort of fee. He then referred to such a case as that of Dister *v.* Dister, where a tenant in fee devises the land, and then makes a feoffment to the use of himself and his heirs. He remained absolute owner as before, and yet the will was held to be revoked by reason of the alteration.

"In Roper *v.* Radcliffe, 10 Mod. Rep. 230, it was conceded by the counsel and the Court, that a devise to a person disabled by law from taking, was a revocation of a prior devise, on the ground of the intention to revoke. Lord *Hardwicke*, in Parsons *v.* Freeman, 3 Atk. 748, recognized the doctrine of the above cases; and held, that if the testator levied a fine, or enfeoffed a stranger to his own use, it was a revocation, though the testator was in of his old use. He admitted, that this was a prodigiously strong instance of the severity of the rule; and Lord *Mansfield* observed, Doug. 722, that the *Earl of Lincoln's* case, decided on the same principle, was shocking. Still it was admitted to be a rule of law, settled and to be observed. Lord *Hardwicke* went at large into the consideration of the same subject, in Sparrow *v.* Hardcastle, 3 Atk. 798; 7 Term Rep. 416, n. S. C., and laid down the same rule. The testator, after the devise, conveyed the estate, and took back a declaration of trust, which afterwards was performed, and ceased, so that he and his heirs were entitled to a reconveyance. Still it was a revocation, for the estate did not continue in the same condition; and any alteration, any new modelling of the estate after the will, was, as he observed, a revocation, except in the cases of mortgages and charges on the estate for debts, which are only a revocation *quoad* the special purpose, and they are taken out of the general rule on the fact of being securities only.

"In Bridges *v.* The Duchess of Chandos, 2 Vesey, 417, Lord *Loughborough* ably reviews the cases, and acknowledges the rule which has been stated. But the great case of Cave *v.* Holford, 3 Vesey, 650, (7 Term Rep. 399; 1 Bos. & Pull. 576, S. C.) led to a thorough examination of all the law on the subject, and was discussed with infinite ability in the several Courts of law and equity; and it was most authoritatively settled, that where a testator, after the will, conveyed the estate to trustees, in trust for himself, in fee, till marriage, and for default of issue of the marriage, to the use of himself in fee, and he married and died without issue, the conveyance was a revocation of the will both in law and equity. The doctrine of the case is, that by a conveyance of the estate devised, the will is revoked, because the estate is altered, though the testator take back the same estate, and by the same instrument, or by a declaration of uses; and though he did not intend to revoke the will. It is revoked upon technical grounds, because the estate has been altered. And Lord *Hardwicke* said, in Sparrow *v.* Hardcastle, the rule had been carried so far, that if the testator suffered a recovery for the very purpose of

[1] Or, by reason of incapacity in the grantee. Walton *v.* Walton, 7 Johns. Ch. 269.

devise. Thus, a feoffment without livery, a bargain and sale, not enrolled, and a defective recovery, have been held to be revocations of prior devises; because such intended alienations were considered as proofs of an alteration of intention. (*a*)

70. It was certified by the Court of King's Bench, to the Court of Chancery, in a modern case, that a deed, intended to operate as an appointment to uses, but not sufficient for that purpose, may have the effect of revoking a will, if the party appear to have had that intention. (*b*) †

95* *71. An *alienation to a trustee*, without any intention of departing with the estate, and *though the alienor take back the old use*, has been held to operate as a *revocation* of a prior devise; because, in such a case, there is an interruption of the seisin; and also because a presumption, in favor of the heir at law, arises from the alienation, that there was an alteration in the intention of the testator.[1]

(*a*) 1 Roll. Ab. 615. 3 Atk. 73, 803. Doe *v.* B. of Llandaff, 2 New. Rep. 491.
(*b*) Shove *v.* Pincke, 5 Term R. 124, 310.

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confirming the will, it was still a revocation, for there was not a continuance of the same unaltered interest.

We see, then, that either a change of the estate, or an act, though nugatory in itself, yet demonstrating an intention to revoke the will, will amount to a revocation; and that the exception to the general rule, making an alteration of the estate a revocation, is the case of a conveyance for the special purpose of payment of debts." See 7 Johns. Ch. R. 267–273.

[† The case of Shove *v.* Pincke can scarcely be deemed an authority for the point for which it is cited by the author; since there, although the deed was not valid as an *appointment*, it was held good either as a *grant or covenant to stand seised*, and therefore it was of course a revocation. See per Lord Eldon, in ex parte the Earl of Ilchester, 7 Ves. 374. The author's proposition, s. 69, is however established by the cases cited in the margin.]

[1] The rule, that by an alienation in fee, after a devise, the devise is revoked at law, even *though the testator takes back the old use*, is regarded as a settled rule of the law of property, irrespective of any presumed intention to revoke, in the mind of the testator, and imperative in its operation. So it was treated by Rooke, J., whose view was approved by a majority of the Judges, in the great case of Cave *v.* Holford, 3 Ves. 650; the decision being made solely on the ground of an *interruption of the seisin*. On the other hand, Eyre, C. J., argued in the same case, with great force of reasoning, in support of the proposition, that where the testator died seised of his old estate, which he had when he made the will, and had made no demonstration of an intention to revoke it, the will was not revoked. Chancellor Kent regards the rule as "hard and unreasonable," but has now become one of the settled rules of property, by force of repeated decisions, and on the mere strength of authority. 4 Kent, Comm. 529, 530; 7 Johns. 267–273; *Supra*, § 68, note.

72. Thus, it was determined in Michaelmas, 44 Edw. III., that where a man, seised in fee of lands, devisable by custom, made his will, he having then two sons, and upon their death, aliened the land in fee, and took back an estate in fee; the will was thereby revoked. (*a*)

73. Lord Lincoln made his will, by which he devised all his estates to the person to whom his title was to descend; afterwards conceiving that he should marry a certain lady, though the lady never had any such intention, he conveyed his estate by lease and release to trustees, in consideration of his intended marriage, to the use of himself and his heirs, until the marriage should take effect, and then, as to part, for his intended wife, &c. No marriage ever took place, and Lord Lincoln died. (*b*)

It was decreed that this conveyance operated as a revocation of the will: and the decree was affirmed in the House of Lords. It is said that the Judges were equally divided in this case; and that all the Lords voted. Lord Mansfield has said of it,— "The absurdity of Lord Lincoln's case is shocking; however, it is now law." (*c*) [1]

74. A by his will, dated in 1708, gave several pecuniary and specific legacies, and then gave all his real and personal estate to

(*a*) Dyer, 143 b. (*b*) Lincoln's case, 1 Ab. Eq. 411. Show. Parl. Ca. 154.
(*c*) 3 Atk. 803. 4 Burr. 1940. 2 Doug. 695, 722.

But it is to be observed, that the decisions on which this rule is supported, are themselves founded on the Statute of Wills, which makes the *seisin* of the testator, and its uninterrupted continuance, essential to a valid devise. But it has already been stated that, in very many of the American States, the necessity of such seisin is done away by statutes. See *supra*, ch. 3, § 8, 37, notes. How far these statutes have gone towards abrogating the rule, is a question which is not known to have been decided; but which will not fail to engage the attention of the diligent and careful student. [See Brown *v.* Brown, 16 Barb. 569.]

[1] Of this case, Mr. Just. Buller said:—"It has happened that in many subsequent cases that determination has been lamented; but it was never denied. Perhaps the misfortune there was, that the deed was not attacked on the ground of insanity." 3 Ves. 659.

Where one, owning a remainder in fee simple, devised all his estates; and afterwards joined the tenant for life in mortgaging the land in fee; the proviso for redemption being, that, on payment of the money, the mortgagee should convey the land to the person entitled to the reversion for the time being, and his heirs and assigns, or to such person as he or they should appoint; it was held that this did not amount to a revocation of the will. Youde *v.* Jones, 9 Jur. 911; 14 Sim. 162, S. C.

B, on condition he took the name of A. Afterwards A, together with J. S. his trustee, by lease and release, conveyed several manors to trustees and their heirs, to the use of himself for life, and that the trustees and their heirs should execute such conveyances thereof as A by writing under his hand and seal, or by his last will, should appoint. The testator died without altering or revoking his said will, or making any appointment touching his real estate. (*a*)

96 * * It was decreed, that the lease and release was a revocation of the will; and the decree was affirmed in the House of Lords.

75. An *alienation made for the sole purpose of strengthening, or giving effect to a previous devise*, has notwithstanding been held to operate as a *revocation* of it, on account of the interruption of the seisin; for in such a case, no alteration of intention could be presumed.[1] †

76. A bastard made his will, and thereby devised a certain manor. He afterwards made a feoffment of the same manor, to the use of such persons, and for such estates, as he had already declared by his will. It was adjudged, that this feoffment was a revocation of the will. (*b*)

77. A person covenanted by indenture to levy a fine, to the use of such persons as he should nominate by his will. He then made a will, by which he devised the lands to certain persons; and afterwards levied a fine in pursuance of the covenant. It was agreed, that the fine operated as a revocation of the will; but in this and the preceding case, the will was held to be a good declaration of the uses of the fine. (*c*)

78. Where a person, who had devised his lands, afterwards

(*a*) Pollen *v.* Huband, 1 Cas. Eq. Abr. 412. 7 Bro. Parl. Ca. 433.
(*b*) Hussey's case, Moo. 789. 1 Roll. Ab. 614.
(*c*) Lutwich *v.* Mitton, 1 Roll. Ab. 614. Hicks *v.* Mors, Amb. 215. Tit. 32, c. 12.

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[1] *Quære;* and see *supra*, § 71, note.

[† In Hodges *v.* Green, 4 Russ. 28. Sir John Leach, M. R. decided, that a conveyance of an estate to trustees, upon trust to sell for payment of a mortgage thereon, and other schedule debts, was not a revocation of a prior will, because it declared that the surplus moneys arising from the sale should be personal estate of the testator, and that was not a purpose beyond the payment of debts, so as to revoke the will, but was a mere expression of that which would be a consequence of law from the execution of the trust.]

levied a fine, or *suffered a recovery* of them, these acts operated as a *revocation* of the devise.[1]

79. A tenant in tail made his will, whereby he devised certain lands; and afterwards, by bargain and sale enrolled, conveyed the same to a tenant to the *præcipe*, against whom a common recovery was suffered, with voucher of the tenant in tail, to the use of himself in fee. It was determined, that the recovery operated as a revocation of the will. (*a*)

80. Sir H. Turner being seised of a considerable estate in tail male, with remainder to himself in fee, and having no son, made his will, by which he devised his estate to his nephew, (who was not his heir,) in strict settlement. Afterwards Sir H. Turner suffered a common recovery of this estate, to the use of himself in fee. Upon the back of the will was written, "*this is my will;*" and afterwards, "*but not now so intended.*" (*b*)

*It was determined, that the recovery, and the declara- *97
tion of the uses of it to Sir H. Turner and his heirs, being subsequent to the will, and inconsistent therewith, as declaring the estates should go to his heir at law, and not to his devisee, operated as a revocation of the will. And it was observed, that a common recovery, as it is a solemn conveyance upon record, and stronger than a feoffment, must needs be a revocation: the recovery being suffered by the tenant in tail, plainly gains an absolute fee, derived out of the estate tail, and which fee was never devised; consequently it must be even stronger than the case where a man, having lands, devises them, and afterwards makes a feoffment of them; though to the use of himself and his heirs, and though this be the old use, yet according to the several cases in 1 Rol. Ab. 614, it is a revocation; and the case of Dister *v.* Dister was cited as exactly in point.

81. It was agreed by marriage articles, that the wife's estate, whereof she was tenant in tail, should be conveyed to the husband in fee. Subsequent to the marriage, the husband devised those lands, and afterwards the husband and wife suffered a recovery of them, to such uses and for such estates as they should

(*a*) Dister *v.* Dister, 3 Lev. 108. (*b*) Marwood *v.* Turner, 3 P. Wms. 163.

[1] See, as to the effect of fines and recoveries, Parker *v.* Biscoe, 3 Moore, 24; Darley *v.* Langworthy, 3 Bro. P. C. 361; Doe *v.* Bp. of Llandaff, 2 New R. 491; Locke *v.* Foote, 5 Sim. 618.

jointly appoint; and in default of appointment, to the use of the husband and his heirs. No appointment was made. (*a*)

It was decreed by Lord Hardwicke, that the will was revoked by the recovery. And he said, (*b*) — "It is admitted that if the testator had been seised in fee, at the date of the will, and had afterwards suffered a recovery, that would have been a revocation; and yet the objection would have held equally there, of the alteration being made only for the particular purpose to enable him and his wife to dispose, without any other form of conveyance. There are a great variety of cases, and nice and artificial distinctions, upon the favor to the heir: one rule, however, is certain, that if a man is seised in fee, and disposes by will, and afterwards makes a conveyance, taking back a new estate, that is a revocation. So if he devises the land, and levies a fine without any use declared; this is a revocation; and yet he takes back the old use unaltered; which is a prodigious strong case."

82. Vincent Darley, being seised of several real estates for his life, with the reversion in fee in himself, made his will, by which he devised them to Mr. Langworthy in strict settlement;
98* some *years after, the testator suffered a common recovery of the estates devised, to the use of himself in fee. (*c*)

The question was, whether the will was revoked by the recovery. The Court of Chancery ordered a case to be stated for the opinion of the Court of Common Pleas, upon the following question: "Whether the deed executed, and the recovery suffered by Vincent Darley, was a revocation of the will."

The case having been fully argued before that Court, Lord Ch. J. Wilmot said, there were a great many determinations touching the revocation of wills, and very nice artificial distinctions were made in favor of heirs at law. It seemed to be clear, from the latest determinations upon the subject, that if a man seised in fee, made his will, and devised; and afterwards conveyed by recovery, fine, feoffment, release, &c., and took back the same or a different estate, it should amount to a revocation. The reason was, that it must be presumed he intended to alter his will.

(*a*) Parsons *v.* Freeman, 3 Atk. 741. (*b*) MS. Rep.
(*c*) Darley *v.* Darley, 6 Amb, 653. 3 Wils. R. 6. See also Lane *v.* Wilkins, 10 East, 241.

The Court certified their opinion, that the deeds executed and the recovery suffered by Vincent Darley, were a revocation of his will. Lord Camden decreed accordingly; and the House of Lords affirmed the decree, as to this point. (*a*)

83. In the case of Selwyn *v.* Selwyn, which has been stated in a former chapter, the will, though made before the return-day of the writ of entry, on which the recovery was suffered, and to which it had relation, was held not to be revoked by the recovery; because the bargain and sale and recovery ought to be considered as one transaction, and as constituting one whole, by reference to its inception. (*b*)

84. It was held by the Court of Common Pleas, upon a motion for a new trial, that where a testator levied a fine to such uses as he should appoint, by deed or will, a prior will was thereby revoked. (*c*)

85. The *doctrine of presumptive and constructive revocations appears to have been carried much too far;* and has been disapproved of by the ablest Judges of modern times. Lord Mansfield has observed, that constructive revocations, contrary to the intention of the testator, ought not to be indulged; and that some overstrained resolutions of that sort had brought a scandal on the law; and on another occasion he said,—"All revocations which are not agreeable to the intention of the testator, are *founded on artificial and absurd reasoning." It is however now fully settled, that wherever a person who has devised an estate, afterwards makes *any alteration* in it, by any mode of conveyance whatever, *inconsistent with the preceding devise;* or by which the estate devised becomes in any respect different from what it was before; such an alteration *will operate as a revocation* of the prior devise. (*d*) *99

86. By articles made in 1777, previous to marriage, the Duke of Chandos covenanted, that he would, within six months after the marriage, cause several freehold and copyhold estates to be conveyed to him, to the intent that the duchess might become entitled to dower thereout; and also that he would, within twelve months after the marriage, and after such conveyances, settle the said estates, subject to dower, to the use of himself for life, re-

(*a*) 3 Bro. Parl. Ca. 53. (*b*) *Ante*, c. 3, § 25, tit. 36. See also 2 New Rep. 401.
(*c*) Doe *v.* Dilnot, 2 New Rep. 401.
(*d*) 3 Burr. 1491. 2 Doug. R. 722. 2 Hen. Black. R. 523.

mainder to trustees to preserve contingent remainders; remainder, after the decease of the duke and duchess, to other trustees for a term of years, to raise portions for younger children; remainder to the first and other sons of the marriage in tail male; remainder to the right heirs of the duke. The marriage took effect; and the duke by his will, dated January 9th, 1780, confirmed the articles, and devised all the estates which he had agreed to settle in case of failure of issue male of the marriage, to the duchess for life; remainder to his daughters, as tenants in common in tail, with several remainders over. (*a*)

Afterwards (in October, 1780,) the duke executed a settlement, purporting to be in pursuance and performance of the articles, by which he granted and released all the estates, comprised in the articles, to trustees, to the use of himself for life; remainder, as to part, to the use of the duchess for life; and as to another part, for securing a jointure of £2,000 a-year to the duchess; remainder to trustees for a term of 1000 years, to secure portions for younger children, nearly as in the articles; remainder to the first and other sons of the marriage, remainder to the duke in fee. Lord Loughborough said, that a court of equity could not adopt different rules respecting the transmission of estates, from those established at law. That the settlement, being in many points inconsistent with the articles, and also with the will, must be deemed a revocation of the will.

On an appeal to the House of Lords, the following reasons were assigned in support of the appellant: I. Because the
100* settlement, *being executed in consequence of the articles, by which the duke was bound to make a conveyance of his estates, ought not to be considered as a distinct and independent deed, but as forming part of the same conveyance with the articles, which bore date antecedent to the will; and therefore could not be deemed a revocation of it. II. Because, by expressly referring to the articles, and professing to carry them into effect, the settlement clearly marked and defined the object which the parties had in view, and excluded every possible idea of an intention to revoke the will; and though the rule were generally true, that any conveyance after the execution of a will, whereby the nature of the estate which the devisor had in him

(*a*) Brydges *v.* Chandos, 2 Ves. 417.

at the time of making the will was altered, operated as a revocation of such prior will; yet it was submitted, that such rule did not apply at all to a case circumstanced as the present; or if it did, that there were many exceptions to that rule, grounded on the nature and tendency of the conveyance, with reference to the intention of the testator, manifested thereby. If the principle of revocation was founded merely on the alteration in the plight of the estate, it could admit of none of those exceptions which had actually been adopted in the case of conveyances in fee, by way of mortgage, or in trust for payment of debts or particular charges subsequent to the execution of a will, and which had been held only a revocation *pro tanto*. These depended entirely on the nature and design of such conveyances; and if so, the settlement in question appeared to fall directly within the same principle. III. Because the duke's will referred in express terms to the articles, and disposed only of such estates and interests as were not bound thereby; and it seemed unreasonable to say, that a deed for carrying those articles into effect, and which the duke must have had in contemplation at the time of making his will, should totally revoke the dispositions contained in that will; although made with reference to ulterior objects, not within the articles or deed. (*a*)

In support of the decree, the following were some of the reasons assigned. Because the testator, after making his will, conveyed and departed with the whole of the estate which he had, in the lands comprised in those deeds, at the time of making his will, and passed that estate to others in fee, declaring the use to himself for life, with limitations thereon, and limiting the ultimate *use to himself in fee simple; and it had been *101 settled, by a series of decisions, which could not be impeached without destroying all security of title, that the conveyance of the entire fee simple of lands to uses, was a revocation of a prior will of such lands; and that the use limited to the grantor himself by such conveyance would not pass by such will, without a republication thereof, but would descend to his heir at law; except in certain cases, bounded by certain rules.

It had been contended, that though the settlement was a revocation at law, it was not so in equity: for that in equity the

(*a*) 7 Bro. Parl. Ca. 505.

devisees had a right to make the heir a trustee for them. Lord Hardwicke, in Parsons *v.* Freeman, (*a*) had said, and the rule was unquestionably established, that the same conveyance which would be a revocation of a devise of a legal estate, would be equally a revocation of a devise of an equitable estate; and that it would be very dangerous to property to hold it otherwise. If, therefore, the conveyance in question was a revocation of the devise at law, what equity could there be to set up the revoked legal devise, against the heir, in favor of the devisee; or for declaring the heir a trustee for the devisee; which would be in effect to convert what was a legal devise into an equitable devise, merely because it was revoked; and therefore of no force as a legal devise. The decree was affirmed.

87. Sir Thomas Cave, by articles dated December 13th, 1790, entered into previous to his marriage with Lady Lucy Sherrard, agreed to make a provision for his intended wife, and the issue of the marriage, out of certain estates. Sir Thomas Cave made his will, dated March 13th, 1791, by which he devised his estates, in case he should die without issue of his body to his uncle, the Rev. Charles Cave, and his issue male, in strict settlement. Afterwards, by deeds of lease and release, dated in May, 1791, reciting the intended marriage, and that Sir T. C. had agreed, upon the treaty for the said marriage, to settle a jointure upon Lady Lucy, in consideration of the marriage and of the fortune of Lady Lucy, he conveyed the estates in question to trustees and their heirs, to the use of himself for life, remainder to the intent that Lady Lucy might receive an annuity of £600 a year for life, as a jointure, and in bar of dower; remainder to
102* the use of the first and other sons of the marriage, in *tail male; remainder to Sir T. C., his heirs and assigns forever. And by other deeds of lease and release, Sir T. Cave conveyed other estates to trustees and their heirs, to the intent that Lady Lucy might receive an additional jointure, with a limitation to trustees for 500 years, for better securing it, with remainder to the use of Sir T. Cave in fee. The marriage took place, and in about six months, Sir T. Cave died, without issue; leaving Sarah Otway his heir at law. A question arose in a suit of chancery, between the devisee and the heir at law of Sir T. Cave, whether

(*a*) 3 Atk. 748.

the first and second deeds of lease and release operated as a revocation of the will. (*a*)

By consent, the parties were ordered to proceed to a trial at the bar of the Court of Common Pleas, where a special verdict was found, stating the above facts. The Judges delivered their opinions *seriatim* on the special verdict, and were unanimous, that the first deeds of lease and release operated as a revocation of the will, as to the lands comprised therein. And three of the Judges thought the second deeds of lease and release had the same effect; but Lord Chief Justice Eyre was of opinion, that they did not operate as a revocation. (*b*)

A writ of error was brought upon this judgment, in the Court of King's Bench, when Lord Kenyon began by observing, that the marriage settlement executing the articles, and on which the principal question depended, limited the reversion in fee to Sir T. C., his heirs and assigns forever; therefore the whole use was disposed of some way or other. He then stated the cases of Parsons *v.* Freeman, (*c*) and Sparrow *v.* Hardcastle; (*d*) and observed, that the doctrine which Lord Hardwicke wished to establish, was this; that any alteration of the estate, or conveyance to uses, after making the will, though the old use remained, which was the case here, was in law a revocation of the will. That supposing in this case Sir T. C. had merely made a conveyance to the use of himself and his heirs forever, that would undoubtedly have operated as a revocation of his will; then could the other uses to which he conveyed the estate make any alteration? He said it had been supposed, in the course of the argument, that the case of Brydges *v.* Chandos (*e*) proceeded on equitable principles; but he knew that the Lord Chancellor meant by that decision to confirm the doctrine established by Lord Hardwicke. He concluded by saying, "I do not enter into the reasons upon which all the cases have been determined; because the best rule *is *stare decisis.* But my opinion is formed *103 upon the authority of all the cases, from the time of Lord Rolle. Such were the opinions of Lord Trevor, Lord Hardwicke, and Lord Mansfield; the latter of whom, though finding fault with former decisions, thought himself fettered by the authori-

(*a*) Goodtitle *v.* Otway, 7 Term R. 399. (*b*) *Vide* 1 Bos. & Pull. 576.
(*c*) *Ante*, § 81. (*d*) *Ante*, § 60. (*e*) *Ante*, § 86.

ties. I take it therefore that the law of the land is now clearly and indisputably fixed, if at any time it can be fixed; that where the whole estate is conveyed away to uses, though the ultimate reversion of it comes back again to the grantor, by the same instrument, it operates as a revocation of a prior will. That being the law, I am bound, how unfortunate soever it may be in this case, to give my opinion in favor of the defendant; and consequently the judgment of the Court of C. B. must be affirmed."

The cause coming on again in the Court of Chancery, upon the equity reserved, the Court was clearly of opinion, that the will was revoked in equity, as well as at law, and decreed accordingly. And on an appeal to the House of Lords, the decree was affirmed. (*a*)

88. It was resolved in a modern case, that *a devise was revoked by an exchange;* though the land after the death of the devisor, was restored to his heir, under an arrangement, in consequence of a defect discovered in the title of the other party to the exchange. (*b*)

89. In the case of a revocation by the execution of a conveyance of lands, subsequent to a devise of them, *parol evidence is not admissible* to prove that the *testator meant* his will should remain in force, and unrevoked by the subsequent conveyance.

90. In Goodtitle *v.* Otway, the plaintiff went into evidence, in the Court of Chancery, of the testator's conversations with his lady and the attorney who prepared all the instruments, to show the motives for making the will; and that the testator had no intention to revoke it; and after the marriage referred to it as his will. But the Lord Chancellor was clearly of opinion, that the parol evidence, being evidence of a republication, if any thing, could not be received. That if the deed did not affect the will at law, it was out of the question: if it did, he could not set up the will again by parol evidence. (*c*)

91. Upon the trial at bar of the above case, in the
104* Court of *Common Pleas, the same evidence was offered; but the Court refused to admit it. (*d*)

(*a*) 3 Ves. 682. [See also Vawser *v.* Jeffrey, 16 Ves. 519. 7 Bro. P. C. 503. S. C. 3 Russ. 479. Rawlins *v.* Burgis, 2 Ves. & B. 382. Hodges *v.* Green, 4 Russ. 28.]
(*b*) Att.-Gen. *v.* Vigor, 8 Ves. 256. (*c*) 2 Ves. 606. (*d*) 2 H. Black. 516.

Lord Chief Justice Eyre said, it was manifest from the opening, that it was intended to be insisted on, that by the necessary operation of the conveyances used, Sir T. C. lost his old estate, upon which the will operated, and took a new one. If so, the consequence was, that though there were the clearest demonstration that it was his intent that the will should operate upon it, the law said it should not; and by that law they were bound. If this was a case of that kind, it was a case that would disappoint the will, even admitting the clearest intention that it should not. All evidence therefore, of intent, seemed to him entirely foreign to the question: all such evidence therefore must be rejected; and the question tried upon its true legal grounds.

Mr. J. Buller observed, that in order to determine whether the evidence was or was not admissible, the Court was to consider to whom it was to be applied. If the question was, whether the testator was incapacitated, or the instructions given were duly followed, the evidence would be admissible. But here the end proposed by it was, to show that the deeds should have a different construction from that which the words imported. That there was a great difference between cases which depended on circumstances, and those which depended on the solemn acts done by the party himself; and that distinction supported the case of Brady *v.* Cubitt. (*a*) There was no act, in that case, done by the testator, importing that he meant to revoke his will, or change it in any respect; but changes having happened in his family by marriage, and the birth of a child, there was a presumption of revocation; and therefore it was to answer that presumption, that the Court received parol evidence. But he could not find, from any one case quoted at the bar, that the Court had received parol evidence, in the case of a deed executed by the party himself, with a view of altering the construction of the instrument.

92. A *conveyance obtained by fraud* will *not* operate as a *revocation* of a prior devise; because, when such a conveyance is set aside, it is considered as a mere nullity, and of as little effect as if it had never been made.

93. Francis Hawes, being seised of a reversion in fee, subject to the life-interest of his father, made his will, and thereby

(*a*) *Ante*, § 50. 1 (Doug. 31.)

105* disposed *of it. The testator's father afterwards obtained from him a conveyance of his reversion, by fraud. The Court of Chancery, having directed the deed to be delivered up to be cancelled, said it was no deed; and therefore could not operate as a revocation of the will. (*a*)†

94. A *mere alteration of the quality of an estate*, without any intention of varying the quantity of the interest, or the disposing power of the owner, will *not* operate as *a revocation* of a preceding devise.

95. Thus, where a man, having feoffees to his use, before the statute 27 Hen. VIII., devised the lands to another, and afterwards the feoffees made a feoffment of the land to the use of the devisor; it was agreed that this feoffment did not operate as a revocation of the devise; for after the feoffment, the devisor had the same use as before. (*b*)

96. It follows from this case, that the acquisition of the legal estate alone, will not operate as a revocation of a devise. Thus, Lord Hardwicke has said, that where a man has an equitable interest in fee in an estate, and afterwards takes a conveyance of the legal estate, to the same uses, this is no revocation. (*c*)

97. G. Jones, by articles, in consideration of marriage, covenanted to convey all his real estates to trustees, to the use of himself for life, remainder in trust to secure an annuity to his intended wife for life, remainder to the first and other sons of the marriage in tail, remainder to the daughters in the same manner, remainder to his own right heirs. Some time after, G. Jones devised all his real estates upon condition that he should have no issue, to his wife, for life, with several remainders over. Afterwards, by indentures of lease and release, G. Jones, in pursuance of the said articles, and in consideration of the said marriage, bargained, sold, and confirmed to trustees and their

(*a*) Hawes *v.* Wyatt, 3 Bro. C. C. 156. *Vide* 6 Ves. 215. 8 Ves. 283. 2 Cox, R. 263. Wright *v.* Littler, 3 Burr. 1244.

(*b*) 1 Roll, Ab. 616, pl. 3. Sug. Pow. 155, and note. Ed. 5. (*c*) 3 Atk. 749.

[† Neither is a void conveyance a revocation; Mathews *v.* Venables, 2 Bing. 136. See also Eilbeck *v.* Wood, 1 Russ. 564. But a deed executed under circumstances which render it void in equity and not at law, is a revocation of a prior will. Simpson *v.* Walker, 5 Sim. 1.]

heirs, all his said real estates, to hold to certain uses and trusts, which were exactly the same as those expressed in the articles. (*a*)

Sir R. P. Arden, M. R., said, the simple question was, whether a man, having an equitable estate, devising it, and taking to * himself afterwards nothing more than the legal interest in that, in which he before had the equitable, has by that simple act, going no further, not modifying it, nor passing to the devisee any thing more than what was before given, revoked his will. He did think that had been decided, both in principle and in precedent; but he was not sure one of the counsel was not right in saying, it had not been exactly decided. But cases seemed to have been taken for granted, at least, which completely proved it. It was stated by Lord Hardwicke, in Parsons *v.* Freeman, and repeated by him in Sparrow *v.* Hardcastle, in which this question, as to the effect a subsequent deed would have upon a will, was much discussed, that taking the legal estate, after a devise of the equitable interest, was no revocation; and it was admitted by Lord Loughborough in Brydges *v.* Chandos. Lord Hardwicke not only admitted, but seemed to consider it as decided and acted upon; if so, the case was determined, for this was nothing more than taking the legal estate exactly in the same manner as he was before seised of the equity. In Parsons *v.* Freeman, which he had looked into very attentively, Lord Hardwicke established this principle, that wherever the estate is modified in a manner different from that in which it stood at the time of making the will, there is a revocation: but wherever the testator remains with the same estate and interest exactly, and disposable by the same means, without any fresh modification, there is no revocation, and the testator will be taken to have passed to the devisee the same interest he acquired, though the one may be legal, the other equitable. (*b*) †

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Upon the whole, he considered, that the devisor had nothing but the reversion in fee; that his acquiring the legal interest

(*a*) Williams *v.* Owens, 2 Ves. 595.
(*b*) *Ante*, § 81. 3 Atk. 798.

[† In the cases of Brydges *v.* Chandos, and Goodtitle *v.* Otway, the conveyances did not pursue the articles, but went beyond them.—*Note to former edition.*]

made no difference; and that the person, to whom the estate was conveyed, was a trustee for the purposes of the will. (*a*)[1]

(*a*) *Vide* Harmood *v.* Oglander, 6 Ves. 199.

[1] The opinion of the Master of the Rolls, (afterwards Ld. Alvanley,) in Williams *v.* Owens, was subsequently explained by him, and the doctrine more largely expounded, in Harmood *v.* Oglander. His observations are too important to be overlooked by the student, in this connection. After stating one of the objections raised in the case then in judgment, he said,—"This brings before the Court a question, that has of late been so much agitated, and upon which so much argument has been used; and, as I believe my opinion in the case of Williams *v.* Owens has been in some degree misunderstood, I am very anxious to explain it; and it bears such an analogy to the present case, that in stating my opinion of that case, and comparing it with the present case, I shall show the ground of my opinion upon this case also. I observe in the report of Cave *v.* Holford, it is said by the then Attorney-General, that it is impossible to reconcile Williams *v.* Owens with Brydges *v.* The Duchess of Chandos. There is this distinction between them: Williams *v.* Owens is, I take it, a strict literal execution of the articles, by which the party was bound, and nothing more: the deed in the other case differs from them. But whether they are reconcilable, or not, it may be proper to state the ground of that case; as some expressions in the Report are certainly inaccurate. At the end of the judgment I am stated to have said, 'that the testator's acquiring the legal interest makes no difference.' I should have said, and the distinction was marked by Mr. *Romilly* in the argument, that the testator having modelled his legal interest in the estate in conformity to the articles makes no difference. It is certainly an inaccurate expression to say, that the testator acquired the legal estate. It never was out of him.

"It is unnecessary to go over the doctrine of revocation; as it has been ably stated by the Judges of the Court of Common Pleas in Goodtitle *v.* Otway. I entirely agree with the three Judges, who held the deed a revocation of the will as to all the estates: but I think with Mr. Justice *Buller*, the articles ought not to have formed any part of the special verdict. The question in a Court of Law is simply whether the legal devise is revoked by the deed. All other questions, as to the partial purpose, &c. are merely equitable questions. I perfectly agree with all the determinations, that have taken place in Courts of Law on questions of revocation, except Luther *v.* Kidby; which with great deference to the authority, by which it was decided, I cannot but consider as anomalous; and I perceive from the Report of Goodtitle *v.* Otway, that Mr. Justice *Heath* looks upon that case in the same light that I do. The question then is, in what cases a Court of Equity has determined, that a deed clearly revoking a will at law is not in equity a revocation, or is only a partial revocation; and I take it to be fully established now, that, if the deed is only for the partial purpose of introducing a particular charge or incumbrance, and does not affect the interest of the testator beyond that purpose, it is only a partial revocation in equity; and though the devisees under the will take no estate, and the estate is vested in the mortgagee or the trustee for a particular purpose, and, after that purpose shall be answered, the use is declared to be for the testator and his heirs, yet a Court of Equity being satisfied, that there was no other object but the partial one, will hold the party a trustee, not for the heir, but for the devisees. Lord *Hardwicke* expressly laid it down, that if a man devises an equitable estate, and afterwards takes a conveyance of the legal estate to him and his heirs,

98. It has been determined, upon the same principle, that where a person devised a copyhold estate, and was afterwards admitted to it, this did not operate as a revocation of the devise.

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though the consequence will be, that the estate will descend upon the heir, the heir will be only a trustee for the devisees.

"Now, to apply these principles to the case of Williams *v.* Owens and to this case. In Williams *v.* Owens it is admitted, that if the testator had died without having conveyed according to the articles, his heir at law, to whom the legal estate would have descended, would have been a trustee for the uses of the articles, and, after they were satisfied, for the devisees. It is likewise admitted, that the testator would have been liable to be called upon to convey according to the articles. What did he convey by the will? At Law, the whole legal estate: in Equity, only the remainder in fee. In Equity he remained seised as before; and the conveyance being only for a particular purpose, and in conformity to the obligation he was under, when he must be supposed to act under the articles, it would be a perversion of the principles, upon which these cases are determined, to consider it a revocation in Equity.

"This is upon the supposition, that Lord *Hardwicke* is right in holding, that, if a man devises an equitable estate, and afterwards takes a conveyance to him and his heirs, he does not revoke the will. It is admitted, that if the testator, instead of covenanting that he would convey according to the articles, had before the date of the will conveyed to a trustee upon those trusts and after the will had called upon the trustee to convey upon the trusts, the will would not have been revoked: yet without question the legal estate would have descended to the heir. The Court would have controlled the law; and would have held the heir to be a trustee for the devisees. What distinction in common sense can there be between the two cases? In Williams *v.* Owens the testator, instead of conveying according to the articles before the will, gave the estate subject to the articles by the will; and then, as he was bound to do, conveyed the legal estate so as to leave himself at law what he had before in equity, the remainder in fee. It is said, that the legal estate passed by the will: and that a conveyance of the legal estate after a devise is a revocation at law; and why should equity control the law? The reason, why a deed revokes a will, is, that a Court of Law cannot look at the articles. But a Court of Equity attends to both; considers the interest at the date of the will and of the deed; and upon all the circumstances determines, whether that, which without the intervention of circumstances, (by which the interest in equity is distinct from the legal interest) must be held a revocation of the beneficial as well as the legal interest, shall in equity be no revocation of the will, so far as it affects the actual interest in a Court of Equity.

"To give some examples. *A*, seised in fee, devises to *B* in fee, charged with the payment of debts; then makes a mortgage in fee; then pays that off; and takes back the estate from the mortgagee to himself and his heirs. This would fall directly within Lord *Hardwicke's* rule; that taking the legal estate from a trustee is not a revocation. By the mortgage there is a complete revocation at law; but a Court of Equity says, he still remains possessed of the estate in equity, subject to the debt secured by the mortgage. Therefore the mortgagee shall be a trustee for the devisee: the mode taken for the security of the debt not being regarded in equity; and the

99. B. North, being seised in fee of a copyhold estate, surrendered the same, in consideration of marriage, to the use of him-

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devisor being complete owner, as before, in equity, subject only to the mortgage. Put the case, not of a mortgage; for it may be said, that in equity it is only a chattel interest; and that he is seised of his former estate: suppose, after the devise, a conveyance of the whole fee, upon trust to sell and pay debts; the surplus, if any, for the testator and his executors; and the remainder of the lands unsold, for him and his heirs. It has been determined by Lord *Thurlow* and other great Judges, to be no revocation in equity. Suppose afterwards, the debts being fully paid, the trustee is called upon by the testator, and conveys to the testator and his heirs: that would be clearly no revocation. Now in this case Equity takes upon it to make the heir, upon whom the estate descends by virtue of a conveyance, by which his ancestor acquired an entirely new estate, a trustee for the devisee under a will made prior to his acquisition of that legal estate. That, I admit, is a strong case; and perhaps it would have been as well for a Court of Equity to have refused to assist the devisee against the heir in such a case; and yet unquestionably the principle is settled and established, that the heir is a trustee for the devisee. I admit the difference in the case of a will and a conveyance afterwards for a partial purpose, the testator then dying without taking back the legal estate; for a Court of Equity has only to decide, to whom the beneficial interest belongs. A Court of Equity declares, he did not mean to revoke; and therefore holds him a trustee for the devisee, and not for the heir; and directs a conveyance.

"Consider then, what circumstances make a revocation, which is clearly a revocation at law, no revocation in equity. What is a revocation in equity? They are fully stated in Cave *v.* Holford, and in the note of Mr. Serjeant *Williams* in his very valuable edition of Saunders's Reports. He there expresses a doubt as to what was said by me as to the operation of a fine; where there is no deed to declare the uses; and I think, he is justified in that doubt. The result of these cases is, that any alteration of the estate, or a new estate taken, is at law a revocation; whether for a partial or a general purpose; to which circumstance a Court of Law cannot advert; neither ought they to take any notice of articles or covenants, charging the estate in equity. They have only to look at the will and the subsequent deed; and say whether at law the old estate is changed and a new estate acquired.

"Consider, in what cases Courts of Equity have controlled the law; not upon the ground of a partial purpose only, nor upon the act being done without an intention to revoke; for that will not authorize a Court of Equity to interfere. A Court of Equity has never interfered with the operation of a will and a subsequent deed, where the testator at the time of the will had the same estate at law and in equity. But where his beneficial interest is different from his legal one, or, where the equitable interest is devised, and the legal estate is not affected, and the testator calls upon the trustee for his legal estate, though the legal estate descends to the heir, yet a Court of Equity says, as the whole beneficial interest passed by the devise, and the trustee, if the devisor had died without calling for the legal estate, would have been a trustee for the devisee, the mere circumstance of the devisor's clothing himself with the legal estate shall not operate as a revocation of the devise of the beneficial interest. Therefore they hold the heir a trustee for the uses of the will. This is expressly laid down in Parsons *v.* Freeman, and is not denied in any case, that I am aware of. In that case, it is to be observed, the testator had no estate at all at law, upon which his will could

self and his heirs, till the solemnization of the marriage; then to *his own use for life, remainder to his intended *107
wife for life, remainder to the children of the marriage, remainder to the said B. North in fee. The marriage took effect,

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operate. Therefore the conveyance from the trustees was a completely new estate. Suppose a man seised in fee makes his will, and then conveys his estate to a trustee for the payment of debts: the law has nothing to do with the purpose of the deed; but can only judge of the legal operation of the deed. But equity says, the estate is not taken out of the testator substantially: he has the same estate in equity as before; and though the mode amounts to a revocation, yet subject to those debts he remains in equity master of the estate, as before; and the will continued to operate upon his interest. In fact they consider him still owner in equity; and therefore, if he calls for the legal estate, by which at law he becomes the purchaser of a new estate, not affected by the will, yet equity holds the heir to be a trustee for the devisees, just as if the legal estate had remained in the trustee.

"This doctrine is applicable also to this case. The principles are, first, that equity will never control the law; except, where the testator has at the date of the will a different interest in equity from that which he has at law; and devises that beneficial interest; and then only takes the legal estate, without any new modification or alteration: secondly, where he has the complete legal and beneficial estate at the date of the will; and afterwards devests himself of the legal estate; but still remains owner of the equitable interest; as in the case of a mortgage or a conveyance for payment of debts: if he dies without taking a conveyance of the legal estate, his equitable interest still continues; and if he has taken back the legal estate, that alone will not revoke the devise of the equitable interest. These rules are clearly deducible from the series of determinations of great Judges in equity. To apply them to Williams *v.* Owens,—If, instead of articles, the testator had before marriage conveyed to a trustee, in trust for himself till the marriage, then for himself for life; remainder to the issue in tail; remainder to himself in fee; then made the will; and then had called upon the trustee to convey; and he had conveyed, it is admitted, that would be a complete revocation at law; but as clearly it would not be a revocation in equity; and the heir must convey to the uses of the will. In principle that does not differ from the case of Williams *v.* Owens. The devisor was bound by the articles; and he might have been compelled to convey accordingly. That would not revoke his will. Then it is strange to say, if the conveyance was taken from a trustee, it would be no revocation, but, if according to his obligation he himself conveyed to the same uses, it would be a revocation. No one can deny, that articles are in equity equal to a conveyance. No one can deny, that he remained a trustee to the uses of the articles; and must have conveyed accordingly, if he had been called upon. Having the whole legal estate in himself, for the legal estate was entirely unaffected, instead of being under the necessity of calling upon a trustee to convey, he conveys himself according to the articles. Is that to be a revocation, when if he had happened to have conveyed to a trustee, instead of entering into articles, a conveyance from the trustee would not have had that effect? Such a determination, if it does not reverse the determinations, which have hitherto prevailed in equity, will in my opinion overturn every principle, upon which they have been decided." See 6 Ves. 218–224; Livingston *v.* Livingston, 3 Johns. Ch. 148, 155, 156; Hughes *v.* Hughes, 2 Munf. 209.

and the next year, 1725, B. North surrendered the premises to the use of his will. In 1743, B. North made his will, by which he devised his copyhold estates in remainder and reversion to his wife in fee. In the year 1751, B. North was admited to the uses of the marriage settlement. (*a*)

It was resolved by the Court of King's Bench, that this admission did not operate as a revocation of the will, and that it passed the reversion in fee.

100. In consequence of this doctrine, it has also been determined, that the *mere change of a trustee* does *not* operate as *a revocation* of a preceding devise.

101. W. Watts devised all his real estates to trustees upon certain trusts; he afterwards made a codicil, reciting that, since the publication of his will, he had contracted for the purchase of certain lands; and thereby directed the trustees and executors named in his will to pay the purchase-money; and that the said purchased premises should be conveyed to the same uses as he had declared concerning his other estates. Afterwards the testator himself completed the purchase, and took a conveyance of the estates to trustees, in trust for himself and his heirs. The question was, whether the conveyance of the newly-purchased lands to the trustees, subsequent to the codicil, was not a revocation; the testator, at the time of making the codicil, having only a trust estate, and the vendor being a trustee for him; so that, before his death, the legal estate was conveyed to other trustees. (*b*)

Lord Bathurst decreed there was no revocation; relying much on the general proposition laid down by Lord Hardwicke in Parsons *v.* Freeman. (*c*)

102. Sir J. Gibbon, having mortgaged his estates in fee, made his will, by which he devised them. Afterwards he paid off the mortgage, and took a conveyance of the estate to a trustee for himself. The Court of King's Bench held, that this being no more than a bare change of a trustee, the will was not revoked. (*d*)

103. A *partition of an estate* between tenants in common does *not* operate as *a revocation* of a prior devise, made by one

(*a*) Roe *v.* Griffits, 4 Burr. 1952. S. C. 1 Bl. R. 605.
(*b*) Watts *v.* Fullarton, 2 Doug. 718. (*c*) *Ante*, § 81. (*d*) Doe *v.* Pott, 2 Doug. 709.

* of the tenants, of his share; even though such a partition *108
be corroborated by a fine.[1]

104. One Temple and two others were tenants in common; Temple made his will in writing of his third part; afterwards, by indenture and fine, a partition was made between the tenants in common; and if this partition was a revocation of the will, was the question. (*a*)

It seemed to all the barons, Montague, Littleton, Thurland, and Bertie, that it was not any revocation. But judgment was not given, because the plaintiff obtained leave to discontinue his action. (*b*)

105. Dorothy Kirby, by her will, taking notice that she was tenant in common with another person, devised her moiety to trustees. She afterwards by indenture between her and the other tenant in common, covenanted to levy a fine of all the premises, and declared the uses thereof, as to certain farms, &c., being one moiety, to Dorothy Kirby and her heirs; and as to the other farms, &c., being the other moiety, to the other tenant in common and her heirs; and a fine was levied accordingly. A question having arisen, whether this deed and fine operated as a revocation of the will, the Lord Chancellor referred it to the Judges of the Court of King's Bench; who certified their opinion, that they were not a revocation; with which the Chancellor agreed, and decreed accordingly. (*c*)

106. But where *a partition* is made, *and a fine* is levied, not merely to establish the partition, but also *for another purpose*, and the estate in the land is altered; there it will operate as *a revocation.*

107. Henry and Robert Tickner being seised of an estate in gavelkind, Robert devised his undivided moiety to his wife in fee; afterwards by deed of partition and fine, all the gavelkind estate which Robert had devised, was allotted entirely to Robert;

(*a*) Risley *v.* Baltinglass, T. Raym. 240. (*b*) Webb *v.* Temple, 1 Freem. 542.
(*c*) Luther *v.* Kirby, 8 Vin. Ab. 148. 3 P. Wms. 169.

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[1] A tenant in common devised his moiety of the estate, and then made partition; and thereupon the estate was conveyed to a trustee, as to one part, to the use of the testator in fee; and a mortgage term, created by the co-tenant, in his moiety, was assigned to attend the inheritance. And it was held, that this was no revocation of the will. Barton *v.* Croxall, Taml. 164. [See Duffel *v.* Barton, 4 Harring. 290.]

to such uses as he should appoint, and in default of appointment, to him in fee. Lord Ch. J. Lee, after mature deliberation, held this transaction to be a revocation of the will. (*a*)

108. In May, 1809, R. agreed to purchase an estate; by his will, dated in July, 1809, and duly attested, he gave all his property to his wife; by deeds of lease and release, dated in September, 1809, the vendor, by the direction of R., conveyed the estate to S., to such uses as R. should, by deed, executed
109* in the *presence of two witnesses, or by will, appoint; subject thereto, to the use of R. for his life; and after the determination of that estate, to the use of S., his heirs and assigns, during the life of R., in trust for R., and to prevent dower, with remainder to the use of R., his heirs and assigns. R. died without having republished his will. It was held by Sir Thomas Plumer, V. C., that the *conveyance was a revocation* of the will, in consequence of the *modification of the estate by the introduction of a power* of appointment, and the *interposition of a trustee.* (*b*) †

109. M. having verbally agreed to purchase an estate, and being in possession of it, devised all his estates; a conveyance was subsequently made to and to the use of M. and a trustee and their heirs and assigns, but as to the estate of the trustee, in trust for M., his heirs and assigns; it was held by Sir J. Leach, V. C., that the subsequent conveyance was not such as was incident to the unqualified equitable fee, but made an alteration in the quality of the estate, and was therefore a revocation. (*c*)

110. A *conveyance*, to have the effect of revoking a prior devise, *must be of the whole estate;* and *coëxtensive with the disposition made by the will.* For if it be but of a part of the estate, it affects the will no further than that part goes.* If it is of a particular estate or interest only, it will not operate as a revocation of the rest. And it has been determined, upon this ground, that a lease, made of lands already devised by will, only

(*a*) Ticknor *v.* Ticknor, cited 3 Atk. 742. *Vide* 7 Ves. 564. 8 Ves. 281. 10 Ves. 249.
(*b*) Rawlins *v.* Burgis, 2 Ves. & Bea. 382. (*c*) Ward *v.* Moore, 4 Madd. 368.

[† The better opinion seems to be, that if, in the preceding case, the contract had stipulated that the estate should be conveyed to the purchaser in fee, or to such uses as he should appoint, the conveyance to uses to bar dower would not have operated as a revocation.]

operates as a partial revocation, or a revocation *pro tanto* of such will. (*a*) [1]

111. A person devised his lands to his eldest son, and afterwards made a lease of them, for thirty years, to his second son, to begin after his death. It was resolved, that this lease only operated as a partial revocation of the will, *quoad* the lease; for both might well stand together. But if the lease had been made to the devisee, then it would have been a revocation; because the estates would have been inconsistent with one another. (*b*)

112. A person devised copyholds to A for life, with different remainders over, and having surrendered them to the use of his will, afterwards, in contemplation of marriage, conveyed his freehold "and copyhold estates to trustees and their *110 heirs, to secure a jointure to his intended wife, and subject to a term of ninety-nine years for that purpose, to the use of himself in fee; and surrendered his copyholds to these uses. The Court of K. B. certified to the Court of Chancery that this did not amount to a total revocation of the will, but that the devisee took the copyhold subject to the charge created by the settlement. (*c*)

113. Although a mortgage in fee, made after the lands mortgaged were devised, be a revocation of such devise at law,[2] yet in equity it is only a revocation *pro tanto;* and the equity will pass to the devisee, notwithstanding the mortgage happens to be made to the devisee himself. The case of Harkness *v.* Bay-

(*a*) (Carter *v.* Thomas, 4 Greenl. 341. Graves *v.* Sheldon, 2 Chipm. 74. Parkhill *v.* Parkhill, Brayt. 239. McRainy *v.* Clarke, 2 Tayl. 278.)

(*b*) Hodgkinsonne *v.* Whood, Cro. Car. 23. 1 Vern. 97. Coke *v.* Bullock, Cro. Jac. 49. Parker *v.* Lamb, 3 Bro. Parl. Ca. 12.

(*c*) Vawser *v.* Jeffrey, 3 Barn. & Ald. 462. Johnson *v.* Johnson, 1 Cr. & Mee. 140; (3 Tyr. 73, S. C.) Hall *v.* Dunch, 1 Vern. 329. 3 Atk. 805. 2 P. Wms. 33. (Brain *v.* Brain, 6 Madd. 221. Youde *v.* Jones, 9 Jur. 911.)

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[1] [A gift of real estate to a son by a father in his lifetime and after the date of his will, is not an ademption *pro tanto* of a pecuniary legacy in the same will, the gift and bequest not being *ejusdem generis*. Dugan *v.* Hollins, 4 Md. Ch. Decis. 139. A conveyance, made subsequently to a devise of land, is not a revocation or satisfaction of a devise of other lands to the grantee. If it be of a portion of the same land, it is a revocation *pro tanto*. Arthur *v.* Arthur, 10 Barb. Sup. Ct. 9; Rose *v.* Rose, 7 Ib. 174.]

[2] Whether, in the United States, the mortgage would be a revocation at law, except *pro tanto*, *quære*. See *ante*, tit. 15, ch. 2, § 1, note; *Supra*, ch. 3, § 8, 37, notes.

ley (*a*) has been supposed to establish a different conclusion, but that misapprehension is now removed by the authority of Baxter *v.* Dyer. (*b*)

114. It has been determined, that *a conveyance in fee to trustees*, for *raising money to pay debts*, being made for a particular purpose, will only operate as *a revocation pro tanto* of a prior devise, so far as relates to the payment of the debts, but no further. (*c*)

115. It is observable, that in the above cases, the whole fee simple being limited to the use of the mortgagee or trustee, the grantor parted with his whole estate at law, without taking back any legal estate or use to himself; and therefore, at law, nothing remained upon which the will could operate, or which could descend to the heir. In these cases, therefore, nothing being left to descend at law, the question has been, to whom the equitable interest should belong; and the courts of equity have held these cases to be exceptions from the general rule of law, which they ordinarily follow, on these grounds, as stated by Lord Harkwicke, namely, that although the conveyance is of the fee simple of the land, yet in the consideration of a court of equity, the interest conveyed is merely a personal interest, having no quality of a real estate; and that therefore the testator is to be deemed, in equity, to have created only a chattel interest, as if he had created a term for years, which would have been a revocation *pro tanto* only at law. All that remained to the grantor was a right of redemption, and that right of redemption did not pass by the conveyance. (*d*)

116. But where a person, after having made his will,
111 * executed * a conveyance in trust for payment of debts in a schedule, and instead of declaring the uses to himself in fee, after payment of the debts, he declared that the trustees should convey to such uses and purposes as he by deed or will should appoint; and for default of appointment, to himself in fee. This was held to be a revocation. (*e*)

117. [The *bankruptcy* of the testator is *not a revocation* of a

(*a*) Prec. in Cha. 514. (*b*) 5 Ves. 656.

(*c*) Vernon *v.* Jones, Prec. in Cha. 32. Ogle *v.* Cooke, 2 Bro. C. C. 592. (Jones *v.* Hartley, 2 Whart. 103. Livingston *v.* Livingston, 3 Johns. Ch. 155.)

(*d*) 7 Bro. Parl. Ca. 517. 3 Atk. 805. Temple *v.* Chandos, 3 Ves. 685.

(*e*) Kenyon *v.* Sutton, 2 Ves. 600. (And see Hodges *v.* Green, 4 Russ. 28.)

prior will beyond the purpose of paying his creditors. The bankrupt laws only take the property out of the bankrupt for that partial purpose, and from the moment the debts are paid, the assignees are mere trustees for the bankrupt.

118. Thus in the case of Charman *v.* Charman, the testator devised his real and personal estate upon trust, after payment of his debts, for his wife for life, and after her decease for his children, equally. Subsequently to the execution of his will, the testator became bankrupt. Out of his personal estate, and by sale of part of his real estate, the creditors, who proved under the commission, were paid; and there remained a surplus of freehold, leasehold, and other personal estate, not required for the payment of his debts. No reconveyance was ever made to the bankrupt, who became of unsound mind, and so continued until his death; he never having passed any examination, nor was any application made for a supersedeas of the commission. The testator's eldest son and heir claimed the real estate, insisting that the bankruptcy was a revocation of the will. But Sir W. Grant, M. R., decided in favor of the will, for the reasons above stated.] (*a*)

119. With respect to leasehold estates, it has been long settled that a *surrender of a lease for lives* and the *taking a new lease*, will operate as *a revocation* of a prior devise of it. For the testator, by the surrender, devests himself of his whole estate in the old lease, and by the renewal acquires a new estate.

120. Sir H. Marwood, being seised of an estate for three lives, held of the Archbishop of York, made his will, by which he devised this lease. He afterwards surrendered it and took a new lease. It was resolved, that this surrender and renewal operated as a revocation of the devise of the lease; for by the surrender the testator had put all out of him, had devested himself of the whole interest; so that there being nothing left for the devise to work upon, the will must fall; and the new purchase being of a *freehold descendible, could not pass by a will *112 made before such purchase. (*b*)

121. Where a person has an estate *pour autre vie*, at the time of making his will, and afterwards purchases the inheritance, it is a revocation of any devise of the estate *pour autre vie*. (*c*)

(*a*) 14 Ves. 580. (*b*) Marwood *v.* Turner, 3 P. Wms. 163. 2 Atk. 597.
(*c*) Galton *v.* Hancock, 2 Atk. 430.

122. Although a term for years, acquired after the making of a will, passes by it; yet if a testator bequeathes a term for years, of which he is then possessed, and afterwards surrenders it, and takes a new term, this will operate as a revocation, or ademption of the bequest; and the new term will be considered as part of the personal estate. (*a*)

123. A person devised two college leases for years to his mother, upon certain trusts. The testator afterwards surrendered the two college leases, and accepted two new leases of the same premises; but the last was not sealed with the college seal till after the death of the testator. (*b*)

Lord Hardwicke decreed, that the bequest of the first lease was revoked; but that of the second lease was not.

124. If, however, the words of the will show the testator's intention to dispose of all terms for years, whereof he may die possessed, a renewed term will pass; for a term for years being only a chattel, there is no necessity for a possession at the time when a will of it is made, or of a continuance of such possession till the testator's death. (*c*)

125. A person devised in the following words:—"As to all and singular my leasehold estate, goods, chattels, and personal estate whatsoever, I give the same to my daughter." The testator, after making his will, renewed a lease for years with the Dean and Chapter of Windsor. Lord Hardwicke said, that what the testator had done in this case was not a revocation. Suppose the testator had purchased a new lease, would not that have passed? Why, then, should not a new term in a lease equally pass? (*d*)

126. A person devised to S. S. her leasehold garden, &c., for the term of his life, and after his decease to his children. After the publication of the will, the testatrix surrendered the lease, and took a new one. The question was, whether the bequest was revoked. (*e*)

Sir W. Grant, M. R., said the question was, whether a specific devise of a leasehold estate was affected by a renewal of
113* *the lease, subsequent to the will. The ground upon which, in many cases, it had been held that renewed

(*a*) *Ante*, c. 3.

(*b*) Abney *v.* Miller, 2 Atk. 593. Rudstone *v.* Anderson, 2 Vez. 418. Hone *v.* Medcraft, 1 Bro. C. C. 261.

(*c*) Carte *v.* Carte, 3 Atk. 174.

(*d*) Stirling *v.* Lydiard, 3 Atk. 199.

(*e*) Slatter *v.* Noton, 16 Ves. 197.

leases did not pass to the specific devisee was, that the thing given no longer existed. But as a testator might undoubtedly dispose of the future, as well as his present interest in a chattel real, it was a question of intention, what the subject of disposition was; whether only the interest which he had at the time of executing the will, or all the interest, though subsequently acquired, which he might have at his death, in the leasehold premises. That intention was to be collected from the words used by the testator to express it; there were no words prospective or future to take in any interest which the testatrix might subsequently acquire in the leasehold: and therefore the renewal operated as a revocation of the bequest; and decreed accordingly. (*a*)

127. In the case of Darley *v.* Darley, the testator devised a term for years, in trust that the same might go unto and be enjoyed by the owner and possessor of his freehold estate thereby devised. The Court of Chancery decreed, that the bequest of the leasehold was revoked by the revocation of the devise of the freehold. But this was reversed by the House of Lords. (*b*)

(*a*) James *v.* Dean, 11 Ves. 383. (*b*) *Ante*, § 82, tit. 13, c. 2. 3 Bro. Parl. Ca. 365.

CHAP. VII.

REPUBLICATION OF DEVISES.

SECT. 1. *Nature and effect of.*
2. *Reëxecution is a Republication.*
3. *And also a Codicil.*
12. *Unless confined to Lands devised by the Will.*
SECT. 15. *Cancelling a second Will republishes the first.*
18. *But a Will once cancelled must be reëxecuted.*
20. *A surrender of a Copyhold is a Republication.*

SECTION 1. As a will or devise of lands is ambulatory during the life of the testator, and may be revoked by him at any time before his death; so *it may be republished;*[1] and a republication of a will has a twofold effect; first, to give it all the effect of a will made at the time of its republication; and secondly, to set up and reëstablish a will that has been revoked.

2. The *first mode of republishing* a will is by a *reëxecution* of it; and although it was held, before the Statute of Frauds, that any words, importing an intention to republish a will, amounted to a republication; yet it is now settled, that an express republication of a will must be *attended with the same circumstances* as are *necessary to its original publication;* for otherwise the Statute of Frauds would be evaded. (*a*)[2]

3. It was formerly held that, since the Statute of Frauds, there could be no devise of lands by an implied republication; for that the paper, in which the devise was contained, ought to be reëxecuted. But it was afterwards determined, that *a codicil* duly attested, and annexed to a will, or referring to a will, should

(*a*) Martin *v.* Savage, 1 Vez. 440. (*Infra*, § 18, note. Jackson *v.* Potter, 9 Johns. 312. Jackson *v.* Holloway, 7 Johns. 394.)

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[1] If a will be executed under such circumstances of the testator as to render it inoperative and void; as, if it be made under undue influence; O'Neal *v.* Farr, 1 Richard. 80; or, by a *feme covert;* Braham *v.* Burchell, 3 Addams, 243; or the like; it may be made valid and operative by a republication, after the testator has become capable of making a valid will; as for example, by the removal of the undue influence; or becoming *discovert*, &c. So, where the will was revoked by implication, *supra*, ch. 6, § 44–88, it may be revived by republication.

[2] As to the mode of publication of a will, see *ante*, ch. 5, § 50–52, note.

operate as a republication of such will, so as to make it take effect from the execution of the codicil. By which means, lands purchased after the execution of the will, and before the *execution of the codicil, pass by the will, [if a contrary *115 intention does not appear, for an expressed intention that they should pass is not required. (*a*) [1]

For *a codicil may operate as a partial republication*, or *no publication at all;* as, where it is *dispositive only as to property previously devised* by the will.] (*b*) [2]

(*a*) Litton *v.* Falkland, 3 Rep. in Cha. 90. Lansdown's case, 10 Mod. 96. Pigott *v.* Waller, 7 Ves. 98, *infra*, § 14. (Richardson *v.* Richardson, C. W. Dud. 184.)

(*b*) Strathmore *v.* Bowes, 7 T. R. 482. 2 Bos. & P. 500, *infra*, § 13. Moneypenny *v.* Bristow, 2 Rus. & Myl. 117.

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[1] See accordingly, Miles *v.* Boyden, 3 Pick. 213; Brownell *v.* D'Wolf, 3 Mason, 486; Dunlap *v.* Dunlap, 4 Desau. 305, 321; Yarnold *v.* Wallis, 4 Y. & C. 160; Doe *v.* Marchant, 6 M. & G. 813; 7 Scott, N. R. 644; 8 Jur. 21; Doe *v.* Walker, 12 M. & W. 591; Goodtitle *v.* Meredith, 2 M. & S. 5; Kendall *v.* Kendall, 5 Munf. 272; Mooers *v.* White, 6 Johns. Ch. 375; [See also Brimmer *v.* Sohier, 1 Cush. 118; Jack *v.* Shoenberger, 22 Penn. (10 Harris,) 416; Wickoff's Appeal, 15 Ib. 281; Love *v.* Johnston, 12 Ired. 355; Murray *v.* Oliver, 6 Ired. Eq. 55.]

The effect of a republication, upon the after-acquired lands of the testator, was very ably argued at the bar, and fully considered by the learned Judges, in Haven *v.* Foster, 14 Pick. 534. After discussing the rule, that a devise operates only on the estate of which the testator was then seised, and that a republication of the will generally causes it to operate upon estates of which he was seised at the time of republication; the Chief Justice expounded the latter rule in these words:—"But to give a republication this effect, the words of the will must be of such a character, as, if used at the date of republication, would include the estate in controversy. The proposition may be stated broadly, that to constitute a good devise, the intent to devise and the power of devising, must concur. In general, the reason why a devise does not take effect, to pass after-purchased estate, is not that there is not a manifest intent to pass all the estate, but because, the devisee not being seised at the time, the legal power of devising is wanting. The question is therefore usually argued as if it was merely a question of power, in which the fact of intent is immaterial. But we think the true question is, do the intent and the power both concur? and the legal consequence will be, to give effect to the devise where they do concur, but to declare it inoperative, if either is wanting.

"If, therefore, the language of the original will be such, as, if used at the date of the republication it would not include the after-purchased estate in its terms or description; or, if the act of republication be accompanied with other provisions, indicating that it was the intention of the testator to limit the operation of the will, as republished, to the same estate which was given, and which would legally pass by the original will, then, notwithstanding such republication, the devise will not include the after-purchased estate; because, although the power then exists to devise, yet the intent is wanting, and as both do not concur, the after-purchased estate does not pass." See 14 Pick. 541.

[2] Thus, where the testator specifically devised an estate to his wife; and after cer-

4. A person, by a codicil, executed according to the Statute of Frauds, reciting that he had made his will, added,—"I hereby ratify and confirm my said will, except in the alterations after mentioned." It was decreed, that the testator's signing and publishing this codicil, in the presence of three witnesses, was a republication of his will, and both together made but one will; and therefore that lands purchased after the execution of the will, and before that of a codicil, passed by the will. And upon an appeal to the House of Lords, the decree was affirmed. (*a*)

5. A testator, by a codicil, written on the back of his will, gave additional legacies and annuities, ratifying and confirming his will; this was attested by three witnesses in these words:—"This will, with the several additions and alterations above, was signed, sealed, and republished by the testator, as his last will and testament, in the presence of us the subscribing witnesses." He afterwards made another codicil, which, though not dated, was agreed to have been made about four or five days before his death, in the presence of three witnesses, reciting that having in his will appointed several limitations and remainders of his estate, some of which were not agreeable to his present intent; he revoked so much as should be found inconsistent with that codicil, ratifying and confirming the other parts which should not interfere therewith. The attestation of which paper was

(*a*) Acherly *v.* Vernon, Com. R. 381. 3 Bro. Parl. Ca. 85.

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tain bequests, devised to her all his freehold, copyhold, and leasehold estates, not therein before otherwise disposed of; and by a subsequent codicil, after reciting the devises to his wife, he, in case she should die before him, devised all his *said* estates to trustees, upon certain trusts; — it was held, that the will was not republished by the codicil, so as to pass estates purchased between the making of the will and the codicil. Smith *v.* Dearmer, 3 Y. & Jer. 278; and see Parker *v.* Biscoe, 3 Moore, 24.

So, where the codicil revoked an annuity given by the will, and revoked the estates and powers given to one of the trustees, who was dead, and substituted another in his stead, with a legacy to the new trustee, for his services in the trust; it was held, that this did not operate to pass an estate acquired after the making of the will. Hughes *v.* Turner, 3 My. & K. 666.

So, though a codicil, republishing a will, generally makes the will speak from the date of the codicil; yet it does not operate to revive or renew a legacy, which has been already revoked, adeemed, or satisfied. Powys *v.* Mansfield, 3 My. & Cr. 359. A codicil merely for a particular purpose, such as changing an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil. Crosbie *v.* Macdonald, 4 Ves. 610. And see Jowett *v.* Board, 12 Jur. 933; [Montague *v.* Montague, 21 Eng. Law & Eq. 575.]

" signed, sealed, published and declared by the testator as a codicil to the last will and testament." (*a*)

Sir J. Strange, M. R., was of opinion that the first codicil amounted to a republication; it answered the idea of a republication, being indorsed on the will, and attested as the statute required; the word *republished* was used, which put it out of doubt; but if not, it would have amounted to a republication, as operating by additional charge on the real estate, and then concluding by ratifying and confirming the will. And in all cases of republication, no precise form of words was necessary; but * any, denoting the continuance of the testator's mind, *116 so far as he made no alteration, would do. 1 Roll. Ab. 617, (Z. 1.) He was also of opinion, that the second codicil amounted to a republication. It was an express declaration that the rest of his intent, not inconsistent therewith, should continue and be confirmed. It might be mischievous to construe that no republication could be, but by the testator's taking the will in his hands, and republishing it by indorsement on it; or annexing the codicil to the will itself. The law in favor of the power of devising, had dispensed with many forms of expression which would be absolutely necessary in other instruments; and inferred republication from an act done, as in 1 Roll. Ab. 617. The person, intending to republish, might be at a distance from the will itself; or might not have it in his power, by its being in another's custody; and might know the substance, though he could not repeat the particulars.

6. The preceding cases appear to establish the proposition, that *where a codicil ratifies and confirms a will,* it *operates as a republication of it;* and Lord Hardwicke seems to have been of this opinion.[1] But in some subsequent cases it was held, that a cod-

(*a*) Potter *v.* Potter, 1 Vez. 337.

[1] The effect of the republication of a will by the codicil, under the statute 1 Vict. c. 26, § 34, (and similar statutory provisions in the United States,) is the same as though the testator, at the date of the codicil, made a new will in the words of the will so republished. Winter *v.* Winter, 5 Hare, 306; 11 Jur. 10.

Where, on the reëxecution of a will, one of the witnesses traced his name over with a dry pen, this was held not a subscribing, within the meaning of the Wills' Act, Playne *v.* Scriven, 13 Jur. 712.

Where one, having by will charged all his estates with the payment of his debts, and

icil which was not annexed to or incorporated in the will, would not operate as a republication of it, unless an intention to republish plainly appeared. (*a*)

7. Thus it was laid down by Lord Camden, that a codicil only operated as a republication of a will in two cases: I. By being annexed to it; and II. By the contents showing the intention. And in the case cited in the margin he decreed, that the will was not republished by a codicil, because the codicil was not annexed to the will; and there was nothing in the codicil which showed any intent in the testator to republish the will. This doctrine has not, however, been assented to; but that established in Archerly *v.* Vernon was held, in the following case, to be the better one. (*b*)

8. A testator, by a will duly executed, devised all his estates in the county of Kent, that he might die seised or possessed of, to trustees, upon trust to sell them to pay his debts, and then to apply the remaining produce to various purposes. Afterwards he purchased other lands in Kent, subject to a mortgage, and covenanted in the purchase-deed to pay the mortgage-money; and gave a bond to indemnify the vendor. By a codicil, 117* he *made some slight alterations in his will, and declared that he ratified and confirmed it. The codicil was begun upon the last sheet of the will, and finished upon another sheet, and was executed in the presence of two witnesses. He afterwards made another codicil, which he began upon the last sheet of the first codicil, and finished upon another sheet; and which was executed in the presence of three witnesses. By the second codicil he revoked a bequest of five shillings a week given by the will to his father, and another legacy; and instead of the latter, gave the legatee one moiety of two leasehold houses; and concluded thus: — "In witness whereof, I the said testator have to this my writing, contained in this and part of the said sheet

(*a*) Amb. 93. Gibson *v.* Montfort, 1 Vez. 492.
(*b*) Att.-General *v.* Downing, Amb. 571.

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devised the residue to his son, afterwards purchased copyholds, which he surrendered to the use of his will, and by a codicil devised them to his son in fee;—it was held a republication of the will, so as to subject these copyholds to the payment of his debts. Rowley *v.* Eyton, 2 Mer. 128; and see Williams *v.* Goodtitle, 10 B. & C. 895.

of paper, which I declare to be a further codicil to my said last will and testament, and which is to be accepted and taken as part thereof, set my hand and seal; that is to say, my hand at the bottom of the said preceding sheet, and my hand and seal to this last sheet thereof, this 28th October, 1788, in the presence of three witnesses." (*a*)

The question was, whether the second codicil was a republication of the will, so as to pass to the trustees lands purchased after the date of the will.

Lord Commissioner Eyre delivered the opinion of the Court, and said, that upon looking into the cases of Acherly *v.* Vernon, (*b*) and the Attorney-General *v.* Downing, (*c*) the question, if it was not to be considered as determined, and so determined as that the Court could hardly consider itself at liberty to review it, would be a question of great difficulty; for it seemed to him that those two cases were in direct opposition to each other. The latter was determined by a very able Judge, and having the former before him, which increased the difficulty. But it seemed to him upon the best consideration, that the former case was so determined, and was of such authority, that every thing must yield to it. The principle, that a codicil attested by three witnesses shall be a republication, seemed intelligible and clear. (*d*) The testator's acknowledgment of his former will, considered as his last will, at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; because, by the nature of it, it supposes a former will, refers to it, and becomes part of it; and being attested by three witnesses, his implied declaration and acknowledgment seems also to be attested by three wit- *118 nesses. Before the statute, it was no part of the essence of the obligation, that the will should be reëxecuted; any thing that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute, reëxecution of the will was not necessary; nothing more was required than a writing, according to the provisions of the statute, expressing that intent. Therefore Lord Hardwicke might well say, (*e*) he saw no great difference between the words — "I

(*a*) Barnes *v.* Crowe, 1 Ves. 486. 4 Bro. C. C. 2. Gordon *v.* Ld. Reay, 5 Sim. 274.
(*b*) *Ante*, § 4.
(*c*) *Ante*, § 7.
(*d*) Goodtitle *v.* Meredith, 2 Man. & Sel. 5.
(*e*) Amb. 97.

desire this codicil may be a part of my will;" and the words,—"I republish it," which it was there admitted would have done. In the Attorney-General *v.* Downing, Lord Camden supposes a particular intent to republish ought to appear; and that annexation, or particular expressions in the codicil, would demonstrate that intention. If that was necessary, not only Lord Hardwicke's opinion could not stand, but neither could Acherly *v.* Vernon, for there was no particular intent to republish; but the testator [in the codicil] referred to his will, made alterations, and gave sufficient demonstration, that when making and executing the codicil, he considered the will as his will, and from that a republication was implied; but it was not particularly in his thoughts, to do any formal act of republication. Upon considering these cases, he confessed he inclined to stand upon the general proposition, stated by Lord Hardwicke, to show that the will, in the case before them, was republished. This case had auxiliary circumstances, which might seem to bring it within the Attorney-General *v.* Downing; for the testator expressly declared, by the original will, that he meant it to operate upon all the lands whereof he should die seised or possessed. If he had not actually incorporated them together, he had inseparably annexed the codicil to the will, not by a wafer or wrapper, or any thing *dehors* the instrument, but by what he called internal annexation; and that of such a kind, that all the papers, taken together, might be considered as published, when the codicil was executed. But he was afraid to rely upon these circumstances, for fear of intrenching upon the statute, by raising evidence out of circumstances in their nature parol; the general ground was safer and better.

It was decreed that the codicil operated as a republication of the will.[1]

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[1] Where three codicils, of different dates, were indorsed on the will; the first two referring to lands mentioned in the will, disposing of after-acquired lands according to directions already contained in the will, and appointing new executors, but attested by only two witnesses; and the third, which was attested by three witnesses, only appointing a new executor in the place of one named in the second codicil; it was held, that the last codicil, which was duly executed, and referred to the second, was a republication of the will and the second codicil; but upon the question whether it also operated as a republication of the first codicil, to which it did not expressly allude, the learned Judges said there might be some doubt. Guest *v.* Willasey, 2 Bing. 429; Utterton *v.* Robins, 1 Ad. & El. 423; S. P. Mooers *v.* White, 6 Johns. Ch. 375.

*9. The doctrine, laid down by Lord Commissioner Eyre in the preceding case, was confirmed by Sir W. Grant, M. R. in the following one. *119

10. Mr. Pigott made his will, duly attested, by which he devised all his real estates to trustees, upon several trusts. The testator made two codicils to his will, which only related to personal estate, but were duly attested; the second of which contained these words, — "To be annexed to my last will and testament, and made part thereof, to all intents and purposes." The testator had purchased a real estate prior to the making of the second codicil; and the question was, whether that codicil operated as a republication of the will, so as to pass that estate. (*a*)

Sir W. Grant, M. R. after stating the preceding cases, said, the Lords Commissioners in Barnes *v.* Crowe, appeared to have held, that in Acherley *v.* Vernon, it was established, that every codicil duly attested ought to be held a republication, and to have adopted and acted upon that rule in that case; their opinion seemed to be, that the codicil was incorporated in the will. The general proposition, referred to by Lord Commissioner Eyre, was, that the execution of a codicil should in all cases be an implied republication. Lord Commissioner Eyre stated the particular circumstances in that case, amounting to what he called internal evidence of annexation; the first codicil, which was not duly executed, was begun upon the last sheet of the will, and the codicil duly attested was begun upon the last sheet of that codicil. But Lord Commissioner Eyre inclined to think annexation could have no effect, and abandoned that ground, for fear of intrenching upon the statute, by raising evidence out of circumstances in their nature parol; and took the general ground, as safer and better. Undoubtedly, therefore, that case was determined upon that general ground. It would be impossible, without contradicting that case, which as it laid down a general rule, he had no disposition to do, to determine in this case against the republication: except the single circumstance of annexation, which Lord Commissioner Eyre laid out of the question, there was no substantial difference between that case and this. That afforded a certain rule; and if he departed from that, it would

(*a*) Pigott *v.* Waller, 7 Ves. 98. Goodtitle *v.* Meredith, 2 M. & S. 5. Hulme *v.* Heygate, 1 Mer. 285.

only be to set every thing loose again, and not to get back to what he thought the better, the old rules, for then Acherly *v.* Vernon would be in the way. He was therefore disposed,
*120 from * the convenience of adhering to settled rules, and deference to former decisions, to hold the codicil a republication. And decreed accordingly. (*a*)[1]

11. In a subsequent case, Sir W. Grant said, that though a codicil had the effect of republishing the will, and making it speak as at the time of the republication; yet that where a power was executed by a will, but afterwards discharged, and a new power created, a subsequent codicil would not, by the mere effect of republishing the will, be an execution of the power. (*b*)

12. But *where the effect of a codicil is expressly confined to the lands devised by the will*, to which it is annexed; it does *not* operate as a republication of such will, so as to make it pass *after-purchased* lands. (*c*)

13. G. Bowes devised all his freehold and copyhold lands to trustees, upon certain trusts; he afterwards purchased other lands, and then made a codicil, whereby, after reciting that he had devised all his freehold and copyhold lands to trustees, he revoked the same, so far as related to two of the trustees named

(*a*) Walpole *v.* Cholmondeley, 7 Term R. 138. 3 Ves. 402.
(*b*) Holmes *v.* Coghill, 7 Ves. 499. (*c*) (*Supra*, § 3, note.)

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[1] In Haven *v.* Foster, 14 Pick. 534, the preceding cases were reviewed, and the general doctrine as to the effect of the codicil in republishing a will, was deduced from them by the Court in the following terms: — "We take the rule, settled by the authorities, to be this, that *primâ facie*, the execution of a codicil to a will of lands, so executed itself as to be capable, within the statute, of passing lands, is a republication of such original will; and that this is more especially and unequivocally the case, where the codicil contains words declaring and confirming the original will to be in force, either in whole, or so far as it is not altered or revoked by the codicil itself; that the effect of such republication is, to make the will operate in the same manner, as if executed at the time of such republication, unless a special intent is manifest in the codicil, to restrain such operation and give it a less extensive effect; and that where the will contains a residuary clause, or words of general description, sufficient to embrace all or any particular description of real estate, of which the devisor is seised, the effect of such republication is, to make the will take effect and operate upon and pass any real estate falling within such description, which may have been purchased by the testator, after the date of the will, and before the republication, unless there is a manifest intent, expressed in the codicil itself, to confine the operation of the will thus republished, to the same estate which the testator held, and upon which the will operated, at the period of its first execution." See 14 Pick. 543, 544.

in his will, and devised his *said* lands, &c. to the other trustees upon the same trusts; and concluded by declaring the codicil to be part of his will. (*a*)

Upon a case sent out of chancery, for the opinion of the Court of King's Bench, Lord Kenyon said, it was clear that a codicil, confirming a will of lands in general words, would pass lands purchased between the making of the will and the codicil. But here the question was, whether it was the intention of the devisor to pass by the codicil any thing more than would have passed by the will itself. Now what was this case? The testator gave all his real and copyhold estates to several trustees by his will, in words sufficiently comprehensive to carry all the estates of which he was then seised; then he made a codicil not to extend his will, but only to revoke so much of it as vested the estates in some of the trustees, whom he had named in his will; and then he gave *his said lands, &c.* that is, those lands which he had before given by his will, to the rest of the trustees.

The Court certified, that the codicil was not a republication of the will, so as to extend the operation of the will to the real estates purchased after the will was executed; it extended to the estates devised by the will, and no further.

* The Court of Chancery decreed accordingly. And on * 121 an appeal to the House of Lords, the decree was affirmed, with the concurrence of the Judges; Lord Thurlow dissenting, and holding the codicil to be a republication. (*b*)

14. In the case of Pigott *v.* Waller, Sir William Grant said, he did not conceive the decision in Strathmore *v.* Bowes to be inconsistent with that of Barnes *v.* Crowe. It did not follow from the doctrine in the latter case, that if it distinctly appeared upon the face of the codicil that it was not the intention to republish the will, the codicil should be held a republication. In Strathmore *v.* Bowes, the Court held, that it appeared upon the face of the codicil that it was not the intention to pass any other lands than those which were devised by the will; it would have been a contradiction, therefore, to make it pass after-purchased lands. (*c*)

15. Where a person makes a will, and afterwards revokes it,

(*a*) Strathmore *v.* Bowes, 7 Term R. 482. (*b*) 2 Bos. & Pull. 500.
(*c*) 7 Ves. 124. See also Moneypenny *v.* Bristow, 2 Rus. & Myl. 117.

by making another will, but does not actually cancel the first will, the *cancelling of the second will operates as a republication of the first.*[1]

16. A person made a will in 1757, and another in 1763. The former was never cancelled; the latter was cancelled by the testator himself. Both were in the testator's custody at the time of his death; the second cancelled, the first uncancelled. The counsel for the heir at law contended, that the second will revoked the first, and being afterwards cancelled, the testator had died intestate; and cited the case *ex parte* Hellier, 3 Atk. 798; where Sir George Lee determined, that the execution of a second will was a revocation of a first, though the second was afterwards cancelled; and that the cancelling the second did not set up the first; which was the same point, only that it was personal property. (*a*)

Lord Mansfield said, that with regard to the case *ex parte* Hellier, Mr. Atkyns only reported what passed in Chancery: there might be other circumstances appearing to the Ecclesiastical

(*a*) Goodright *v.* Glazier, 4 Burr. 2512.

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[1] The rule, that where the latter of two inconsistent wills is subsequently revoked, cancelled, or destroyed, the former will, *if it remains entire*, is thereby restored to its original position and validity, though formerly in full force, has of late been greatly modified, if not wholly abandoned, in the Ecclesiastical Courts; and the question is now regarded as open for decision either way, according to the circumstances. Usticke *v.* Bawden, 2 Add. 116; James *v.* Cohen, 3 Curt. 770. And see Boudinot *v.* Bradford, 2 Dall. 266, 268; Bohanon *v.* Walcott, 1 How. Mis. R. 336; [Flintham *v.* Bradford, 10 Barr. 82.] Suffering the first will to remain entire, and preserving it, and allowing it to survive him, have been regarded as proofs of the testator's intention that it should remain in force. Taylor *v.* Taylor, 2 Nott & McC. 482. And see 4 Kent, Comm. 531; 1 Jarm. on Wills, [124] Perkins's ed.; 2 Greenl. Evid. § 683, and cases there cited.

In England, the question is now settled by stat. 1 Vict. c. 26, § 22, by which it is enacted, that no will, once revoked, shall be revived, otherwise than by the reëxecution thereof, or by a codicil, duly executed, showing an intention to revive it.

In the statutes of *New York*, it is enacted, that "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, cancelling, or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will, or unless, after such destruction, cancelling, or revocation, he shall duly republish his first will." N. Y. Rev. St. Vol. II. p. 126, § 45, (3d ed.) A similar provision is found in the Revised Statutes of *Ohio*, 1841, ch. 129, § 42; and of *Indiana*, 1843, ch. 30, § 30; and of *Missouri*, 1845, ch. 185, § 14; and of *Arkansas*, 1837, ch. 157, § 15.

Court which might amount to a revocation of a will of personal estate. Here the intention of the testator was plain and clear. A will was ambulatory till the death of the testator. If the testator let it stand till he died, it was his will; if he did not suffer it to do so, it was not his will. Here he had two; he had cancelled the second; it had no effect, no operation; it was as no will at all, being cancelled before his death; but *122 the former, which was never cancelled, stood as his will.

Mr. Justice Yates said, a will had no operation till the death of the testator; the second will never operated, it was only intentional; the testator changed his intention and cancelled it. If, by making the second, the testator intended to revoke the former, yet that revocation was itself revokable, and he had revoked it. (*a*)

17. [And notwithstanding the second will, which is cancelled, contains an express clause revoking the first will, such first will will be reëstablished by cancelling the second. A contrary opinion appears to have formerly prevailed, but it is not easy to discover any sound reason why effect should be given to that clause in the cancelled will which revokes the prior will, while all the rest of the cancelled will is rendered nugatory.]

18. But where a person, having made a new will, *cancelled the former one*, and *afterwards cancelled the latter* will; it was held that *this did not amount to a republication* of the former will; for where a will was once cancelled, nothing but a reëxecution of it would amount to a republication. (*b*) [1]

19. N. Newenden made a will in 1759, of which he executed a duplicate, and gave it to another person: he made a second will in 1761, at which time he cancelled one of the copies of his first will, by tearing off the seal. After the testator's death, both

(*a*) Utterson *v.* Utterson, 3 Ves. & Bea. 122.

(*b*) Harwood *v.* Goodright, Cowp. 92. 1 Pow. Devis. 528, note by Jarman, and the cases there cited.

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[1] It is not necessary that the testator, in such case, should *sign* the will again; but it is sufficient if he expressly acknowledges the signature to be his own, and declares his intent then to republish it as his last will, in presence of the number of witnesses required by law; they attesting the same. *Supra*, ch. § 7–50; Witter *v.* Mott, 2 Conn. R. 67; Musser *v.* Curry, 3 Wash. 481; Reynolds *v.* Shirley, 7 Ham, 79; Jackson *v.* Potter, 9 Johns. 312.

the first and second wills were found together in a paper, cancelled; and the duplicate of the first will was found uncancelled, in the testator's room, among other papers. It was determined that the testator had died intestate; for the cancelling the copy which the testator had in his possession, of the first will, was a cancelling of the duplicate; and therefore, at the time of making the second will, the first was, upon every principle of law, most clearly revoked, and could never be set up again, but by a re-execution. (*a*)

20. A *surrender of a copyhold to the use of a person's will, may be worded* in such a manner as to operate as a *republication* of a former will, so as to make the copyhold pass by such will.

21. A person having made his will, and devised all his freehold and copyhold estates to several uses, afterwards purchased other copyhold lands, which he surrendered thus: "To the uses declared or to be declared in and by his last will and testament." (*b*)

The Court of Chancery directed a case to be sent to
123 * the Court of * King's Bench, whether the after-purchased copyholds passed by the will.

Lord Mansfield said, when a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the time of the date of the republication; just the same as if he had such additional property at the time of making his will. Therefore, if one devises lands by the name of B, C, and D, and purchases new lands, and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands, B, C, and D. But if the testator in his will says, "I give *all* my real estate;" a republication will affect such newly-purchased lands, because it is then the same as if the testator had made a new will. Apply this rule to the case of a surrender, and I am of opinion that the surrenderer may express himself so as to make it relate to a will actually made; and that the copyhold lands so surrendered will pass by it. Suppose a testator, seised of copyhold lands, makes his will without a sur-

(*a*) Burtonshaw *v.* Gilbert, Cowp. 49. (James *v.* Marvin, 3 Conn. R. 576.) Pemberton *v.* Pemberton, 13 Ves. 290.

(*b*) Heylyn *v.* Heylyn, Cowp. 130. 1 Walk. Cop. 128. (And see Doe *v.* Davy, Cowp. 158. Lofft, 749. 2 Doug. 716, n.)

render; if he afterwards surrender them to the use of his will, such surrender will clearly make his will good, and is effectual to pass them; because it only obviates the mode and form of conveyance. What has the testator done here? Having made his will, and declared his lands to uses, he surrenders his newly-purchased copyholds to the uses, intents, and purposes declared, or to be declared, in his will. It is precisely the same thing as if he had said, "And whereas I have made a will so and so, and devised all my lands to I. S. to such and such uses; I mean these newly-purchased lands should pass to the same uses."

The Court certified, that the surrender did, by express reference to the uses declared by the will, adopt and apply the words of the will to the copyhold lands, as if the testator had been seised thereof at the time of making the said will; and therefore they were subject to the same uses, to which all the testator's copyhold-lands were devised. (*a*)

(*a*) Att.-Gen. *v.* Vigor, 8 Ves. 256.

CHAP. VIII.

OF VOID DEVISES.

SECT. 2. *Devise to the Heir at Law.*
5. *Though charged with Debts.*
9. *The Devisee must have been sole Heir.*
11. *A difference in the Estate rendered the Devise good.*
18. *Devises to Charitable Uses.*
SECT. 21. *Where there has been Fraud.*
23. *Where the Devisee dies before the Devisor.*
36. *The Estate descends to the Heir.*
39. *Where the Devise is uncertain.*
42. *Or the Devisee disagrees.*

SECTION 1. DEVISES are in some cases void *ab initio;* as where the testator devises what the law already gives, or in mortmain, or where any fraud has been practised on the testator; and devises are also void where they are totally uncertain.

2. With respect to the first sort of devises that are void *ab initio*, it is a rule of law,[1] that where a testator makes the *same disposition of his estate as the law would have done*, if he had been silent, the will, being unnecessary, is *void.* If therefore, a person devises his lands to his heir at law, in fee, it is a mere nullity, and the heir will take by descent, as his better title; for the descent strengthens the title by taking away the entry of those who might have a right to the lands; whereas, if the heir took by the devise, he was then only in by purchase. And this rule applies to wills made in pursuance of powers, as well as to devises deriving their effect from the Statute of Wills. (*a*)

3. Thus, where a person devised lands to his wife for life, remainder in fee to I. S. who was his heir at law, it was a void devise as to the remainder; because the reversion would have descended to I. S. after the determination of the particular estate. (*b*)

4. The same rule is applied to copyholds; and therefore a

(*a*) (Parsons *v.* Winslow, 6 Mass. 169.) Tit. 29, c. 1, s. 7. Tit. 32, c. 17.
(*b*) Bashpool's case, 2 Leon. 101. Hurst *v.* Winchelsea, 1 Bl. R. 187.

[1] Altered in England by stat. 3 & 4, c. 106. See *infra*, § 17.

surrender *of a copyhold to the use of a will, and a de- *125
vise thereof to the heir at law, will not give the devisee an estate by purchase. (*a*)

5. *Although the devisor charges his estate with the payment of his debts,* or with *portions* to his younger children, yet if he afterwards devises the estate to his heir at law in fee, the devise will be void, and the heir at law will take by descent. (*b*)

6. A person devised to each of his younger children £20 when they attained the age of twenty-one years, and devised all his estates to his eldest son, to hold to him and his heirs, upon condition that he should pay to his other children the said sums appointed to them; and if he did not pay the same, then the lands to go to the younger children and their heirs. Adjudged that the eldest son took by descent. (*c*)

7. A person, seised in fee, devised lands to his wife for life, and after her decease, to his next heir at law, and to his or her heirs; provided such heir should pay £1,000 to such person or persons as his wife should appoint. It was resolved, that the heir took by descent, and not by the will. And it would be mischievous if every little legacy should alter the course of descent, upon which the heir might plead to the obligation of the ancestor, *riens per descent.* (*d*)

8. In an action of debt on the bond of the father, to whom the defendant was heir, the plea was *riens per descent;* the fact was, that the father had devised his lands to the defendant, charged with debts; and the question was, whether this made him a purchaser. The Court said, that a charge on the estate did not alter the manner of the heir's taking the land. A devise was void, where it gave the same estate as would be taken by descent. Judgment for the plaintiff. (*e*)

9. But *the devisee must be sole heir* to the lands devised; for if he was only one of the heirs, he would take under the devise.

10. A. B. having two daughters, one of them had issue a son, and died. A. B. devised all his estate to this son of his daughter, in fee; and the question was whether the son should take all

(*a*) Smith *v.* Triggs, 1 Stra. 487. (*b*) Fearne's Opin. 229.
(*c*) Haynsworth *v.* Pretty, Cro. Eliz. 833, 919. Emerson *v.* Inchbird, 1 Ld. Raym. 728.
(*d*) Clark *v.* Smith, Com. R. 72.
(*e*) Allen *v.* Heber, 1 Black. R. 22. Chaplin *v.* Leroux, 5 M. & Sel. 14.

by this devise, or one moiety by descent, and the other by devise; for there could not be a descent of a moiety to one coparcener as heir: one could not plead a descent *uni filiæ et* * *cohæredi;*
126 * but it was a descent to all. It was resolved that the grandson took by devise. (*a*)

11. Where, however, an estate is devised to an heir at law, *different in point of quantity* from that which he would take by descent, *the devise will prevail*, and the *devisee shall take under it* as a purchaser. Thus, it is laid down in Plowden, 545, that if a man devises his lands to his son and heir, to have to him and the heirs of his body, this is a good devise, because it is another estate than he would have had by descent. (*b*)

12. A person devised to his eldest son, and to his heirs and assigns, all other his real estate not before devised; nevertheless, in case he should die without issue, not having attained twenty-one, then from and immediately after his death under age, and without issue, unto the testator's son William. Lord Keeper Henley was of opinion, that the eldest son took by devise, as having under the will a different estate than would have descended to him; the one being pure and absolute, the other not. (*c*)

13. But the authority of the preceding case is materially shaken, if not overruled, by Doe *v.* Timins, in which there was a devise to the heir at law in fee, with an executory devise over, in case he did not attain twenty-one years; the Court of K. B. held, that this did not alter the quality of the estate, which he would otherwise have taken as heir, and that he therefore took by descent, and not by purchase. (*d*)

14. A *difference in the quality* of the estate will also *give effect to the devise.* Thus in Mich. 37–38 Eliz., Lord Coke, who was then Attorney-General, demanded of the Court of King's Bench their opinion on this case. A man having two daughters, being his heirs, devised his lands to them and their heirs, and died. Whether they should take as joint tenants by the devise, or as coparceners by descent? And all the Justices held clearly, that they should have it as joint tenants; for the devise gave it to

(*a*) Reading *v.* Royston, 1 Salk. 242. 2 Ld. Raym. 829. Com. R. 123.
(*b*) Swaine *v.* Burton, 15 Ves. 371. *Infra*, c. 12.
(*c*) Scott *v.* Scott, Amb. 383. 1 Eden, 458.
(*d*) Doe *v.* Timins, 1 Barn. & Ald. 530. See also Chaplin *v.* Leroux, 5 M. & Sel. 14.

them in another degree than the common law would have given it. (*a*)

15. In a *formedon in the descender*, brought by A, B, and C, of lands in gavelkind, the warranty of the ancestor was pleaded in bar against them, upon which they were at issue, if assets by descent. It was found by verdict, that the father of the demandant was seised in fee of the lands, being of the nature of gavelkind, and devised the same to the demandants, *127 being his heirs by the custom, and to their heirs, equally to be divided amongst them. And if the demandants should be accounted to be in of the lands by descent, or devise, was the question; for if by devise, then they should not be assets. The Court was of opinion that they were in by the devise; because they took as tenants in common. (*b*)

16. In an opinion of Mr. Fearne, which has been printed, he says, that a devise to the heir and another, as tenants in common, will not prevent the heir's taking his moiety by descent. For suppose a testator devises a moiety, or any other undivided share of his real estate, to a stranger, making no disposition of all the remaining undivided share, such remaining share would of course descend to his heir at law, and he must hold it in common with the devisee of the undivided share devised. It was clear, therefore, that an heir might take by descent, as tenant in common with a devisee, an undivided part of the estate of which his ancestor was solely seised: and it appeared to be immaterial whether the share he so takes is expressly devised to him, or left unnoticed by the will: for if expressly devised, he takes it in common; and if not noticed, he takes it in the same manner: and a devise to two or more as tenants in common is in effect a devise of one undivided part to one, and of another undivided part to the other. So that under such a devise to an heir and a stranger, as tenants in common, the heir takes as if one undivided moiety were devised to the stranger, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will, in which case he would have taken by descent; and therefore, the same estate being devised to him in such residue, as he would have taken by descent, the general rule respecting devises to an heir extends to it. (*c*)

(*a*) Cro. Eliz. 431. (*b*) Bear's case, 1 Leon. 112. (*c*) Fearne's Opin. 128. *Infra*, c. 15.

17. [But the rule of law discussed in the preceding sections of this chapter, is now only applicable to devises in wills of testators dying previously to, or on the 31st day of December, 1833; for now, by the fourth section of the stat. 3 & 4 Will. IV. c. 106, it is enacted, that when any land shall have been devised by any testator, who shall die after the above day, to the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent.]

128* * 18. In consequence of the statute 9 Geo. II. c. 36, which has been already stated, all devises and bequests of lands and tenements, or of any sums of money to be laid out in the purchase of lands and tenements, for any charitable uses whatsoever, are void. (*a*) † [1]

19. A devise was held by Lord Northington to be void, being proved to be upon a secret trust for a charity; conveyances having been made by the devisees, and the trust declared, though they denied by their answer having made any promise. (*b*)

20. In another case, before the same Judge, where there was a devise by will, attested by three witnesses, to A, B, and C, and the heirs of the survivor; the bill stated, that it was upon a secret trust for a charity, declared by an instrument, executed at the

(*a*) Tit. 32, c. 2, s. 35, et. seq. sup. p. 16, note. (*b*) Edwards *v.* Pike, 1 Eden, R. 267.

[† A devise accompanied with a desire that the devisee would convey to some charitable use (the will afterwards limiting an estate for life to the devisee) was held void in toto. Doe *v.* Wrighte, 2 Bar. & Ald. 710.—*Note to former edition.*]

[1] This statute, as Chancellor Kent, observes, was not in any sense a mortmain act; but its sole object was to protect persons *in extremis* from imposition. 4 Kent, Comm. 507, note. The reasons which induced its passage, in England, have long since in great measure ceased; and in this country their existence has ever been rather imaginary than real. The policy of such enactments, even in England, has been severely questioned by Mr. Jarman, in his Treatise on Wills, Vol. I. p. 211, note; and his observations apply here with augmented force.

In the United States, with the exception of Pennsylvania, the statutes of mortmain have not been reënacted or practised upon; but every corporation may take and hold lands to any uses, not foreign to the purposes of its creation; subject only to the restrictions which a few of the States have imposed. See *supra*, ch. 2, § 20, note; see also 2 Kent, Comm. 283; 4 Kent, Comm. 507; Angell & Ames on Corp. ch. 5, p. 112, 113; *Ante*, tit. 1, § 40, note; Tit. 11, ch. 2, § 15, note; Tit. 32, ch. 2, § 34, note; 1 Jarm. on Wills, 57, 58, 197, notes by Perkins; Sohier *v.* St. Paul's Ch. 12 Met. 250; Gibson *v.* M'Call, 1 Rich. 174. [A bequest for the promotion of religious and charitable uses and enterprises is valid, even though there be no trustee appointed to carry the same into effect. In such a case, the heir at law or the executor, as the case may be, becomes the trustee, or one will be appointed by a Court of Equity. Brown *v.* Kelsey, 2 Cush. 243; see also Williams *v.* Williams, 4 Selden, (N. Y.) 525; Beall *v.* Fox, 4 Geo. 404.]

same time as the will, but attested by two witnesses only, which was admitted by the answer; held, that the devise was void, under the Statute of Mortmain. (*a*)

21. Where *any fraud or circumvention has been practised on a testator*, or where he was *incapable*, by any *weakness of mind*, of disposing of his lands, the devise is void. But if the validity of a will of lands be impeached on these grounds, a court of equity will not set it aside, but will direct a trial at law, on the issue of *devisavit vel non.* For if the will be obtained by fraud, or be made by a person incapable of devising, it is not in point of law the testator's will; and therefore these points are proper to be tried by a jury. (*b*) [1]

22. It was held in a modern case, that in order to set aside a will for fraud, parol evidence might be given of questions asked by the testator, at the time of executing his will, whether the contents were the same as those of a former will. (*c*)

(*a*) Boson *v.* Statham, 1 Eden, R. 508. 9 Ves. 519.
(*b*) Kerrich *v.* Bransby, 7 Bro. Parl. Ca. 437. Webb *v.* Claverden, 2 Atk. 424.
(*c*) Doe *v.* Allen, 8 Term R. 147.

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[1] The declarations of the testator, before and at the time of making the will, and afterwards, if so near the time as to be a part of the *res gestæ*, are admissible to show fraud in obtaining the will. But subsequent declarations, not part of the *res gestæ*, are not admissible; especially where the will has always been in the testator's possession. At all times such evidence is suspicious; of very easy fabrication, and yet of very difficult refutation.

The declarations of the testator, as to his *intention* to alter, revoke, or destroy his will, and that he had been prevailed upon not to do so, are not admissible to show that such alteration or revocation was fraudulently prevented; such fraudulent prevention or suppression must be shown, if at all, by *acts* done or attempted to be done, by the testator, and suppressed by fraud, violence, circumvention, or threats. But whether even this latter kind of evidence is admissible, since the Statute of Frauds, is exceedingly doubtful. Per Story, J., in Smith *v.* Fenner, 1 Gall. 172, 173. [Declarations of the testator made near the time of the execution of the will, are admissible to show the state and condition of his mind, but not to show that undue importunity and influence were exerted over him; and such proof must be limited to showing weakness of mind, and it is not competent to prove the facts stated in such declarations. Robinson *v.* Hutchinson, 26 Vt. (3 Deane,) 38; Waterman *v.* Whitney, 1 Kernan, N. Y. 157; Parramore *v.* Taylor, 11 Gratt. (Va.) 220; See also Kenworthy *v.* Williams, 5 Ind. (Porter,) 375; Banyard *v.* McElroy, 21 Ala. 311; Gilbert *v.* Gilbert, 22 Ib. 529; Roberts *v.* Trawick, 17 Ib. 55; S. C. 13 Ib. 68; McTaggart *v.* Thompson, 14 Penn. State R. (2 Harris,) 149. Fraud or undue influence in procuring one legacy, does not invalidate other legacies which are the result of the free will of the testator, but if the fraud or undue influence affects the whole will, though exercised by one legatee only, the whole will is void. Florey *v.* Florey, 24 Ala. 241.]

23. A devise may become void by an event subsequent to the making of a will. Thus, it is a rule, that *if the devisee dies before the devisor, the devise becomes void.* A doctrine, which was probably derived from the rule of the Roman law.— *Pro non scriptis sunt iis relicta qui, vivo testatore, decedunt.* (*a*) [1]

(*a*) (Anderson *v.* Parsons, 4 Greenl. 486.)

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[1] This rule of law has been recently changed in England, by the statute of 1 Vict. c. 26, § 33, which provides, that where the devisee dies before the testator, leaving issue alive at the testator's death, the devise shall not lapse, but shall take effect as though the devisee had died immediately after the testator, unless a contrary intention shall appear by the will.

Provisions, similar in substance, but somewhat varying in details, exist in a majority of the United States. Thus, in *Maine*, *Massachusetts*, *Vermont*, *Ohio*, *Michigan*, and *Missouri*, it is only where the devisee is "a *child* or *other relation*" of the testator, that the devise does not lapse.

In *New York*, *New Jersey*, *Pennsylvania*, *Virginia*, *Indiana*, *Mississippi*, and *Arkansas*, the provision applies only to the case where the devisee is "a child or *other descendant*" of the testator.

In *Connecticut* and *Illinois*, the devisee must be either "a child *or grandchild*" of the testator.

And in *New Hampshire*, *Rhode Island*, and *Georgia*, the provision extends to a gift to "*any legatee or devisee*" whomsoever.

It is further qualified in *South Carolina*, by the condition that, if any child die in the lifetime of the parent testator, leaving issue, any legacy given to the child shall go to his or her issue, *unless* such deceased child was equally portioned with the other children, by the parent, when living. LL. S. Car. Vol. V. p. 107.

Upon the English statute it has been held, that a devise to the testator's daughter, in trust, to be settled by her for the benefit of her children, did not lapse by her death. Ford *v.* Fowler, 3 Beav. 146.

If the devisee dies, leaving no issue living at the death of the testator, the case is not within any of the above statutes, and of course the devise lapses, by the common law. Fisher *v.* Hill, 7 Mass. 86; Ballard *v.* Ballard, 18 Pick. 41.

In case of the pre-decease of the devisee, leaving issue, it has been further held, upon the English statute, that the issue is not substituted for the deceased devisee, at all events; but that the gift became the absolute property of the original devisee, so as to be disposable by his will, notwithstanding his death before the testator. Johnson *v.* Johnson, 3 Hare, 157; 8 Jur. 77. And see Griffiths *v.* Gale, 12 Sim. 327, 354; 8 Jur. 235. Other cases are — Lee *v.* Pain, 4 Hare, 250; Hatfield *v.* Pryme, 9 Jur. 838; Penny *v.* Turner, 10 Jur. 768.

[A will provided that the executors of the testator should, on the death of his wife, apply the residue of his property for the use of such charitable institutions as they should deem best. The wife survived the executors, and it was held, that a contingency not provided for had happened, and that the bequest lapsed. Fontain *v.* Ravenel, 17 How. U. S. 369. So where there was a gift to a religious corporation, whose charter expired before the death of the surviving annuitant, it was held that the legacy lapsed. Andrew *v.* N. Y. Bible, &c. Society, 4 Sandf. Sup. Ct. 156. The refusal or incapacity of the first devisee to take, where there is a devise to several in succession, does not

24. A devised lands to B and his heirs. B died in the lifetime of the testator. The question was, whether the heir of B should take any thing by this devise. It was determined that *he should not; for it was a principle of law, that *129 in all gifts, whether by devise or otherwise, there ought to be a person *in esse* capable of taking at the time the gift vests; and as the thing devised cannot vest till the death of the devisor, at which time devisee was dead, it followed that he could take nothing by the devise. As to the word "*heirs*" being inserted in the devise, it was only used as a word of limitation, to denote the quantity of estate which the devisor meant to give, and not with an intention to describe the heirs of B, or to give them any thing. (*a*)

25. Henry Fuller, having issue four sons, John, Richard, Edward, and Henry, devised lands to his second son, and the heirs of his body, and after his death without issue, then to his third son. The second son died in the lifetime of his father, leaving issue. It was adjudged, that the issue of the second son took nothing by the devise, it being lapsed; but that the third son might enter. (*b*)

26. T. Addison, having two daughters, devised all his estates to his second daughter, and the heirs of her body begotten, and for want of such issue, to his eldest daughter. The second daughter died in the lifetime of the testator, leaving a son. Adjudged, that the devise to the second daughter became void, by her dying in the lifetime of the testator; and that her son could not take as heir of her body. It was also resolved, that the eldest daughter should take immediately, by virtue of the devise; for when the first devise is void, the remainder shall take place as if no such devise had been made. (*c*)

27. R. Wynn devised his estate to his brother M. Wynn, and the heirs male of his body, remainder to O. Wynn and the heirs

(*a*) Brett *v.* Rygden, Plowd. 341. See 3 Mau. & Selw. 300.

(*b*) Fuller *v.* Fuller, Cro. Eliz. 422. Doe *v.* Colyear, 11 East, 548.

(*c*) Hutton *v.* Simpson, 2 Vern. 722. S. C. Prec. in Chan. 439. Davy *v.* Kemp, O. Bridg. Rep. 384.

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cause it to lapse, but it passes to the next in succession. Yeaton *v.* Roberts, 8 Foster, (N. H.) 459. See also Norris *v.* Beyea, 15 Barb. 416; DeKay *v.* Irving, 5 Denio, 646; Perry *v.* Logan, 5 Rich. Eq. 202.]

male of his body. M. and O. Wynn died in the lifetime of the testator; but O. Wynn left an only son, who claimed under the devise. It was resolved that he took nothing. (*a*)

28. One, seised in fee, devised lands to A and his issue, remainder to B and his issue, remainder to the heirs of A. A died without issue in the lifetime of the testator; and B died in the lifetime of the testator, leaving issue the defendant, who was also the heir of A; and the plaintiff was the heir of the testator. The question was, whether, as the devisees A and B both died in the lifetime of the testator, the issue of B, who was born after the will was made, and so could not take jointly with
130* the devisees, *could take either as heir of the body of B or as right heir of A. (*b*)

Lord Ch. J. Parker delivered the unanimous opinion of the Court, that this case was exactly within the reason of the case of Brett *v.* Rygden. First, because as well in this case the word *issue*, as in that the word *heirs*, was clearly used as a word of limitation, viz., to measure out the quantity of estate that the devisee was to take; and not as a word of purchase; the devisee only being in the view and consideration of the testator, and the words *heir* or *issue* mentioned for nothing else, but to limit what estate the devisee should take. (*c*)

29. Susan Jolland devised certain lands to the use and behoof of her sister Elizabeth, the wife of John Belchier, and her assigns for and during the term of her natural life; and after the determination of that estate, to the use of W. A. and J. P. and their heirs, during the life of the said Elizabeth, upon trust to preserve the contingent uses and estates, thereinafter limited, from being defeated or destroyed; and from and after her decease, then to the use of the heirs of the body of the said Elizabeth, lawfully issuing; and for want of such issue, to the use and behoof of her sister Catherine Jolland, in the same words as are used in the devise to Elizabeth. (*d*)

Elizabeth Belchier died in the lifetime of the testatrix, leaving issue one daughter, Catherine. Upon the death of the testatrix, Catherine Jolland, who married one Hodgson, suffered a recovery

(*a*) Wynn *v.* Wynn, 3 Bro. Par. Ca. 95.
(*b*) Goodright *v.* Wright, 1 P. Wms. 397. 1 Stra. 25. 10 Mod. 370.
(*c*) *Ante*, s. 23. Busby *v.* Greenslate, 1 Stra. 445.
(*d*) Hodgson *v.* Ambrose, Doug. 337. 3 Bro. P. C. Toml. ed. 416.

of the premises. A question having arisen in the Court of Chancery, respecting the construction of this will, a case was made for the opinion of the Judges of the Court of King's Bench, upon the following question:—"Whether Catherine Belchier, the daughter of Elizabeth Belchier, took any and what estate, under the will of Susan Jolland?" To which the Judges of the Court of King's Bench answered,—"If Elizabeth Belchier would have taken an estate tail, in case she had survived the testatrix, we think, by her dying before the testatrix, it is a lapsed devise, and Catherine, the daughter of Elizabeth, can take nothing." (*a*)

The Court of Chancery having decreed in conformity to this certificate, an appeal was brought in the House of Lords, and the following question was put to the Judges: "Whether Catherine Belchier, the daughter of Elizabeth Belchier, took any and what estate under the will of Susan Jolland."

* The Lord Ch. B. delivered the unanimous opinion of *131
the Judges present, that Catherine Belchier took no estate under the will of Susan Jolland.† The decree was affirmed.

30. Rich. White, having issue Simon his eldest son, and Hamilton his second son, devised all his lands in B. to his eldest son Simon, and the heirs of his body; and for default of issue of his said son Simon, then he devised his said estate to his son Hamilton, and the heirs of his body. Simon died in the lifetime of his father, leaving issue four sons and four daughters. The question was, whether the eldest son of Simon took any thing by this devise, or whether it lapsed to Hamilton, the person next in remainder. (*b*)

The Court of King's Bench in Ireland determined, that the eldest son of Simon took under this devise. This judgment was reversed by the Court of King's Bench in England. A writ of error was then brought in the House of Lords; and it was contended on behalf of the eldest son of Simon, that he ought to take under this devise. I. Because it was plain the testator did not mean to exclude the issue of his eldest son from the inheritance, the children of Simon being alive, and known to the tes-

(*a*) *Vide infra*, c. 14. (*b*) Warner *v.* White, 3 Bro. Parl. Ca. 435.

[† It was also held that Catherine Jolland took an estate tail. *Infra*, c. 14.—*Note to former edition.*]

tator, at the time he made the devise to Simon and the heirs of his body. II. Because the remainder to Hamilton was expressly limited to take effect only in default of issue of the testator's son Simon; and no devise was made of the estate, until such default should happen; and it was a principle in law, that the heir should take every thing which was not devised from him. III. Because courts of justice have been always anxious to effectuate the intentions of testators, where they are not contrary to the rules of law, or settled authorities; and there was no case to be found, in which it had been adjudged, that a devise to a man and the heirs of his body lapsed, for the benefit of a person in remainder, from the circumstance of the first devisee dying in the testator's lifetime; where it appeared that the heir of the body of the first devisee was likewise heir at law of the testator.

On the other side it was contended, that by the established rules of law, the devise to Simon became void, by his death in the lifetime of the testator; and the remainder to Ham-
132* ilton the *second son, took effect immediately on his father's death. This doctrine had been adopted in early times, and had continued down to the present. It was established in the early part of the reign of Queen Elizabeth, and was recognized in a variety of cases, down to the year 1780, nor was it ever judicially contradicted or impeached. But there appeared at the end of the report of Fuller *v.* Fuller, Cro. Eliz. 422, a *dictum* of Lord Ch. J. Popham, that where a devise was to a son in tail, his issue, in case of his death in the lifetime of his father, should take before the remainder-man. But this, at most, was an extrajudicial opinion; and was not admitted in the case of Hodgson *v.* Ambrose. (*a*)

The following question was put to the Judges:—"Whether, in the event that had happened, the defendant, Hamilton White, took any, and what estate, in the lands of B, under the devise to him, for default of issue of Simon White?"

The Lord Ch. Baron delivered the unanimous opinion of the Judges present, that Hamilton White took an estate tail; and the judgment of the Court of King's Bench in England was affirmed.

(*a*) *Ante*, § 24. *Ante*, § 28.

31. A republication of a will, after the death of a devisee in tail, will not give any estate to the issue of the devisee.

32. N. G. devised lands to her goddaughter and the heirs of her body, who died in the lifetime of the testatrix, leaving a son. The devisor knew of the death of the devisee, and of the birth of her son; after which she made a codicil that operated as a republication of her will. It was determined, that the devise, having become void by the death of the devisee, did not operate by its republication, so as to give any estate to the son of the devisee. (*a*)

33. It has been stated, that where a trust is sufficiently created, it will fasten itself upon the land, and will not become void by the incapacity or death of the trustee. (*b*)

34. In consequence of this principle, it was determined by Lord Camden, that where an estate was devised to trustees, upon trust for a charity, the death of the trustees in the lifetime of the testator, did not make the devise void. (*c*)

35. Lord Hardwicke has observed, that in the case of copyholds, though the land passes by the surrender, and the will is *only directory of the uses; yet, if the devisee dies *133 in the lifetime of the devisor, the devise is void. (*d*)

36. Where a devise of lands in fee simple becomes *lapsed by the death of the devisee, in the lifetime of the testator*, the estate devised *will not go to the residuary devisee* of the real estate, *but will descend to the heir at law* of the testator.[1]

37. A person devised his messuage in E. to F. C. and his heirs, and all the rest and residue of his messuages, lands, and hereditaments, to I. L., his heirs and assigns forever. F. C. died in the lifetime of the testator, by which the devise to him lapsed. And the question was, whether the latter clause in the will would carry over the lapsed devise to the residuary devisee, or it should descend to the heir at law of the testator. (*e*)

The Court held, that the devise of all the rest and residue

(*a*) Doe *v.* Kett, 4 Term R. 601. (*b*) Tit. 12, c. 1, s. 90.
(*c*) Att.-Gen. *v.* Downing, Amb. 571. (*d*) 2 Vez. 77. Williams *v.* Coade, 10 Ves. 503.
(*e*) Wright *v.* Hall, Fortesc. 182. Roe *v.* Fludd, Id. 184, S. P.

[1] A *lapsed* devise goes to the heir at law; but a *void* devise goes to the residuary devisee, if there be any. Ferguson *v.* Hedges, 1 Harringt. 524.

did not convey what was devised before; for wills must be construed from the intent of the testator at the time of making them, which appeared to be to give his whole estate to F. C. and his heirs in the messuage of E.; and at the time when the will was made he had no residue left in that messuage; and the devise to F. C. being void, the messuage would descend to the heir.

38. In a subsequent case of the same kind, reported by Lord Ch. J. Willes, the following propositions were laid down:— I. That the intent of the testator ought always to take place, when it is not contrary to the rules of law. II. That the intent of the testator ought always to be taken as things stood at the time of making his will; and was not to be collected from subsequent accidents, which the testator could not then foresee. III. That when a testator, in his will, had given away all his estate and interest in certain lands, so that if he were to die immediately, nothing remained undisposed of, he could not intend to give any thing in those lands to his residuary devisee. And judgment was given accordingly. (*a*)

39. Where it is impossible to discover, from the words of a will, what was meant to be given, or to whom, the will is *void for uncertainty*.[1]

(*a*) Doe *v.* Underdown, Willes Rep. 293.

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[1] Words cannot be said to be ambiguous, because they are unintelligible to a man who cannot read; nor is a written instrument ambiguous, merely because an ignorant or uninformed person may be unable to interpret it. *It is ambiguous only, when found to be of uncertain meaning, by persons of competent skill and information.* Neither is a Judge at liberty to declare an instrument ambiguous, because he is ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this were not so, then the question, whether a will or other instrument were ambiguous, might depend, not upon the propriety of the language the party has used, but upon the degree of knowledge, general or even local, which a particular Judge might happen to possess; nay, the technical accuracy and precision of a scientific man might occasion his intestacy, or defeat his contract. Hence it follows, that no Judge is at liberty to pronounce an instrument ambiguous, until he has brought to his aid, in its interpretation, all the lights afforded by the collateral facts and circumstances, which may be proved by parol. In other words, and more generally speaking, if the Court, placing itself in the situation in which the testator or contracting party stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot ascertain his meaning and intention from the language of the instru-

40. Thus, it is laid down in 33 & 34 Eliz. by Wray and Ander-

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ment, thus illustrated, it is a case of incurable and hopeless uncertainty, and the instrument therefore is so far inoperative and void. See 1 Greenl. on Evid. § 298, 300, and cases there cited.

It has therefore been said, that it must be an extreme case, in which the Court will declare a will void for uncertainty; Den *v.* M'Murtrie, 3 Green, 276; and that, to avoid a will for this cause, it is not enough that the dispositions in it are so obscure and irrational that it is difficult to believe they could have been intended by the testator; but it must be incapable of any clear meaning whatever. Mason *v.* Robinson, 2 Sim. & Stu. 295.

Thus, a devise of the testator's farm to his two nieces, the daughters of J. V., and his grandson, is not void for uncertainty, though the testator had three nieces, daughters of J. V., living when he made his will, and also, at his decease; but the three were held entitled to two thirds of the farm. Vernor *v.* Henry, 6 Watts, 192.

A devise of the residue of his estate "to the cause of Christ, for the benefit and promotion of true evangelical piety and religion," with a direction to the executor to pay it over to certain persons, to be by them so appropriated; was held valid, and by virtue of the statute of 43 Eliz. c. 4, not void for uncertainty. Going *v.* Emery, 16 Pick. 107.

But a direction to trustees, to apply the residue of the testator's personal estate, to such benevolent, charitable and religious purposes as they, in their discretion, may think most advantageous and beneficial, has been held too uncertain, and therefore void. Williams *v.* Kershaw, 5 Cl. & Fin. 111. And see Ellis *v.* Selby, 7 Sim. 352.

So, a request by a testator, that "a handsome gratuity" be given to each of his executors, is void for uncertainty. Jubber *v.* Jubber, 9 Sim. 503. And see, for other particular examples of uncertainty as to the object, Phillips *v.* Eastwood, Ll. & G. 270; Heneage *v.* Ld. Andover, 10 Price, 230; Jones *v.* Hancock, 4 Dow, 145; Richardson *v.* Watson, 4 B. & Ad. 787; Atto.-Gen. *v.* Hinkman, 2 Jac. & W. 270.

As to the *person* or *object* of the testator's bounty, it has been held, that a devise to T. P. "who resided at A. when I left England, *or* to his *heirs, executors, administrators or assigns;*" the devisee having died in the testator's lifetime, was void for uncertainty. Waite *v.* Templer, 2 Sim. 524. So, a devise "to the right heirs of me the testator forever, my son excepted; it being my will he shall have no part in my estate," was held void, as a devise. Pugh *v.* Goodtitle, 3 Bro. P. C. 454. So, a direction, that after the expiration of a life-estate, all his real and personal estate should "be divided according to the Statute of Distributions, *in that case made and provided.*" Thomas *v.* Thomas, 3 B. & C. 825; 5 D. & R. 700, S. C.

See further, as to uncertainty in the person or subject, 1 Jarman on Wills, ch. 13, p. 315–348, and the notes of Mr. Perkins. Gallego *v.* Atto.-Gen. 3 Leigh, 450. [A bequest was made to "the New York Methodist Conference Society for the support of old and worn-out preachers." Held that "the New York Annual Conference Ministers' Mutual Assistance Society," upon proof of its objects and that it was the only society within the limits of the Conference with such objects, was entitled to the bequest. New York Annual Conference Ministers' Mutual Assistance Society *v.* Clarkson, 4 Halst. Ch. R. (N. J.) 541. This clause in a will, "to each of my daughters a small tract of land," was held void. Weatherhead *v.* Baskerville, 11 How. U. S. 329. See also Second *v.* First Congregational Society, 14 N. H. 315; Townsend *v.* Downer, 23 Vt. (8 Washb.)

son, Ch. Justices, that if a man has two sons of the name of John, and devises his lands to his son John, if no direct
134 * proof *can be made of his intent, as to which of his sons he meant, the devise is void for the uncertainty. (*a*)

41. Testator left and bequeathed to all his grandchildren share and share alike. It was held, by Sir Thos. Plumer, M. R., that the devise was void, there being uncertainty both in the subject and in the objects of the bequest. (*b*)

42. It has been stated in a former chapter that a *devisee may disagree* to and disclaim a devise *by deed*, in which case nothing will vest in him; consequently the devise becomes *void*, and the lands descend to the heir at law. (*c*)[1]

(*a*) 5 Rep. 68, b. Doe *v.* Joinville, 3 East, 172.

(*b*) Mohun *v.* Mohun, 1 Swanst. 201. [Richardson *v.* Watson, 4 B. & Adol. 787. Att.-Gen. *v.* Sibthorp, 2 Russ. & Myl. 107.] (Flint *v.* Hughes, 6 Beav. 342. Trippe *v.* Frazier, 4 H. & J. 446.)

(*c*) *Ante*, c. 1, s. 18. Townson *v.* Tickell, tit. 32, c. 26.

225; White *v.* Fisk, 22 Conn. 31. See also Robinson *v.* Allen, 11 Gratt. (Va.) 785; Timberlake *v.* Harris, 7 Ired. Eq. 188; Taylor *v.* The American Bible Society, Ib. 201; Gregory *v.* Smith, 15 Eng. Law & Eq. R. 202; Adams *v.* Jones, 9 Ib. 269; Jackson *v.* Craig, 3 Ib. 173.]

[1] The doctrine in the text is universally held; but there are diversities of opinion upon the question, whether it is necessary for the devisee to disclaim *by deed;* some affirming that he may do this *by parol.* The decision of this question would seem to turn upon another, namely, whether the estate is vested absolutely in the devisee, upon the death of the testator, by operation of law, and without his own act, volition, or actual knowledge; the devise being regarded as always for his benefit, and his assent therefore being presumed; or whether the devise is to be regarded as "nothing more than an offer, which the devisee may accept or refuse." If the former is the true rule of law, it seems that the estate ought to be renounced by some known and recognized mode of conveying an estate. If the latter, then any solemn and unequivocal *act of refusal*, though without deed, would seem to be sufficient. The general practice is to execute a deed; and this course a prudent counsellor will always advise. But it is said in Shep. Touchst. p. 452, that a verbal waiver is sufficient; and this seems to have been the opinion of all the Judges in Townson *v.* Tickell, 3 B. & Ald. 31; though in that case, the renunciation was by deed. In the later case of Doe *v.* Smyth, 6 B. & C. 112, the question was raised, but a decision of it was expressly waived, as unnecessary; though the Chief Justice remarked that, "it may be admitted that a devisee cannot be compelled to accept the devised interest, but may, by *some* mode, renounce and disclaim it." And, see Doe *v.* Harris, 16 M. & W. 517. As to the necessity of some act or volition of the alienee, in order to vest the title in him, see *ante*, tit. 32, ch. 1, § 25, note. Chancellor Kent treats it as still an open question; adding that, "Perhaps the case will be governed by circumstances." 4 Kent, Comm. 534. The point was raised in Webster *v.* Gilman, 1 Story, R. 499, upon the fact of a long acquiescence, on the part of the devisee, in the open possession of the land by

one claiming it by disseisin. The testator died about the year 1795; and his daughter, Lady Holland, the devisee, executed a deed of release and surrender of all her right in the land to the demandant, in 1836; this being her only act in regard to the lands. The tenant's possession commenced as early as the year 1799, and had continued ever since without interruption. This point was disposed of by Mr. Justice Story, in delivering the judgment of the Court, in the following terms:—"But then, it is said, that Lady Holland, in fact, never accepted the life-estate in the premises under the will, but waived, or refused, or disclaimed the same; and that her acquiescence for so long a period, without asserting any right of entry or possession, is a sufficient proof thereof. We see no reason, in the facts of the case, upon which such a conclusion can be legitimately founded. On the contrary, her deed to her son is cogent evidence, that she did assert her title under the will, and meant (although ineffectually in point of law) to convey that title by her deed to her son. We know of no rule of law, by which a mere naked non-possession, or non-exercise of the right of entry and possession of real estate under a devise, short of the period prescribed by the Statute of Limitations to bar a right of entry, is held to amount to a positive renunciation, or disclaimer of a devise, or to proof thereof. It may be even doubtful, whether, under our laws, any renunciation, or disclaimer, not by deed or matter of record, would be an extinguishment of the right of the devisee. But, at all events, it should be evidenced by some solemn act or acknowledgment in writing, or by some open and positive act of renunciation, or disclaimer, which will prevent all future cavil, and operate in point of evidence, as a *quasi* estoppel." See 1 Story, R. 514, 515. In one American case, however, it has been held that the disclaimer must be *in writing*. Bryan *v.* Hyre, 1 Rob. Virg. R. 94.

See also, ex parte Fuller, 2 Story, R. 327, 330; Brown *v.* Wood, 17 Mass. 74; Ward *v.* Fuller, 15 Pick. 190; Ives *v.* Allyn, 13 Verm. 609.

Whether a devisee in trust can disclaim by deed, after having in words assented to the devise in trust, *quære.* Doe *v.* Harris, *supra.*

[The refusal or incapacity of the first devisee to take, where there is a devise to several in succession, does not cause it to lapse, but it passes to the next in succession. Yeaton *v.* Roberts, 8 Foster, (N. H.) 459; see also DeKay *v.* Irving, 5 Denio, 646.]

CHAP. IX.

CONSTRUCTION OF DEVISES.—GENERAL RULES.[1]

SECT. 1. *The Intention must be effectuated.*
15. *Words rejected or supplied.*
18. *The word* or *construed* and.
25. *The word* and *construed* or.
29. And *and* or *construed literally.*
30. *Particular Estates sometimes transposed.*
SECT. 32. *Contradictory Devises.*
33. *A Perpetuity cannot be Created.*
40. *But the Construction will be* cy-pres.
45. *No Averment admitted to explain Devises.*
48. *Unless there is a latent ambiguity.*

SECTION 1. A WILL, being considered as an instrument, made at a time when the testator cannot have the assistance of persons

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[1] As to *what law is to govern the formalities* of a will of lands, the general rule of law is, that the law of the place where the land lies, *lex rei sitæ*, is to govern as to the capacity or incapacity of the testator, the extent of his power to dispose of the estate, and the forms and solemnities requisite to give the will its validity and effect. But this rule has been abrogated in many of the United States, and a different rule adopted, by which lands in those States may pass by a will, made in a foreign country or state, in the form required by the law of the foreign state, and proved abroad. See *supra*, ch. 5, § 69, note.

But in regard to the *interpretation* of wills, whether of movable or immovable property, where the object is merely to ascertain the meaning and intent of the testator, if the will is made at the place of his domicile, the general rule of the Common Law is, that it is to be interpreted by the law of that place. Thus, for example, if the question be, whether the terms of a foreign will include the "real estate" of the testator, or what he intended to give under those words; or whether he intended, that the legatee should take an estate in fee or for life only; or who are the proper persons to take, under the words "heirs at law," or other *designatio personarum*, recourse is to be had to the law of the place where the will was made and the testator domiciled. And if the will is made in the place of his actual domicile, but he is in fact a native of another country; or if it is made in his native country, but in fact his actual domicile at the time is in another country; still it is to be interpreted by reference to the law of the place of his actual domicile. The question, whether, if the testator makes his will in one place, where he is domiciled, and afterwards acquires a new domicile in another country, where he dies, the rule of interpretation is changed by his removal, so that if the terms have a different meaning in the two countries, the law of the new domicile shall prevail, or whether the interpretation

skilled in the law, or, as it is usually expressed, when he is *inops consilii*, the Judges have at all times held, that it shall not be construed strictly, like a deed, but that *the intention of the testator*, though not expressed in the proper legal and formal words, shall, notwithstanding, be *carried into effect;* it being a maxim of the English law,— *Quod ultima voluntas testatoris perimplenda est, secundum veram intentionem.*[1]

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shall remain as it stood by the law of the domicile where the will was made, is a question which does not seem yet to have undergone any absolute and positive decision in the courts acting under the common law. See 2 Greenl. on Evid. § 670, 671, and cases there cited; Story, Confl. Laws, § 479, *a* to *m;* 4 Kent, Comm. 513; 1 Jarm. on Wills, p. 1–10, and Perkins's notes.

Where a Scotchman, domiciled in England, and having only personal property, being on a *visit* in Scotland, executed and deposited there a will prepared in the Scotch form, and died in England; it was held, that the will was to be construed according to the English law. Anstruther *v.* Chalmer, 2 Sim. 1. So, the will of a subject of Great Britain, made in India, must be construed according to the laws of England. Trotter *v.* Trotter, 4 Bligh. N. S. 502.

[1] That the intention of the testator, as collected from the entire will with its codicils, must prevail, unless it violate some rule of law, is a principle everywhere recognized. See Kent, Comm. 534; Finlay *v.* King, 3 Pet. 346; Henegge *v.* Ld. Andover, 10 Prince, 316; Land *v.* Otley, 4 Rand, 313; Rene *v.* Davis, 4 Hen. & Munf. 328; Westcott *v.* Cady, 5 Johns. Ch. 343; Leavens *v.* Butler, 8 Port. 380; Den *v.* McMurtrie, 3 Green, 276.

For the convenience of the student, Mr. Powell's Rules for the construction of Devises are here inserted; omitting the authorities he cites for them; and adding only some of a later date, and a few qualifications, in parentheses. See 2 Pow. on Dev. by Jarman, p. 5–11.

1. That technical words are not necessary to give effect to any species of disposition in a will.

2. That the construction of a will is the same at law and in equity, the jurisdiction of each being governed by the nature of the subject.

3. That a will *speaks*, for some purposes, from the period of execution, and for others, from the death of the testator; but never *operates* till the latter period. [Gold *v.* Judson, 21 Conn. 616; Canfield *v.* Bostwick, Ib. 550.]

4. That the heir is not to be disinherited, without an express devise, or necessary implication; such implication importing, not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed. Bender *v.* Dietrick, 7 W. & S. 284. [Gage *v.* Gage, 9 Foster, (N. H.) 533; Allen's Executors *v.* Allen, 18 How. U. S. 385.]

5. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are *absolutely irreconcilable*, (and the intention cannot be ascertained,) the latter part will prevail. Hoxie *v.* Hoxie, 7 Paige, 187; Covenhoven *v.* Shuler, 2 Paige, 122; Fraser *v.* Boone, 1 Hill, Ch. R. 367; Westcott *v.* Cady, 5 Johns. Ch. R. 343; Sherrat *v.* Bentley, 2 My. & K. 149; Jones *v.* Doe, 1 Scam. 276. [Deering *v.* Adams, 37 Maine, (2 Heath,) 264.]

6. That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will; though it may be used to rebut a resulting trust, attaching to a legal

2. It follows that *no technical words are necessary* to convey a testator's meaning; and whenever that is doubtful, it must be

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title created by it. Comport *v.* Mather, 2 W. & S. 450. For the exposition of this and the two following rules, see 1 Greenl. Evid. § 277, 278, 280–283, 286–291, 295. [Allen's Exor's *v.* Allen, 18 How. U. S. 385; Trustees *v.* Peaslee, 15 N. H. 317; Button *v.* American Tract Society, 23 Vt. (8 Washb.) 336; Gaither *v.* Gaither, 3 Md. Ch. Dec. 158; Walston *v.* White, 5 Md. 297; President, &c. *v.* Norwood, 1 Busbee, 29 (N. C.) p. 65.]

7. Nor can the meaning of words be varied by such evidence; and therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible.

8. But the courts will look at the circumstances under which the devisor made his will; as the state of his property, of his family, and the like. Lowe *v.* Ld. Huntingtower, 4 Russ. 232; Noel *v.* Noel, 12 Price, 216; Edens *v.* Williams, 3 Murph. 27.

9. That, in general, implication is admissible only in the absence of, and not to control, an express disposition.

10. That an express and positive devise cannot be controlled by the reason assigned, (in the absence of fraud in the devisee,) nor by inference and argument from the other parts of the will; and accordingly such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents; though such reference may be used to assist the construction, in case of ambiguity or doubt.

11. That the inconvenience or absurdity of a devise, is no ground for varying the construction, where the terms of it are unambiguous; nor is the fact, that the testator did not foresee all the consequences of it, a reason for varying it; but, where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than in an irrational and inconsistent purpose. Manigault *v.* Deas, 1 Bailey, Eq. R. 298; Defflis *v.* Goldschmidt, 19 Ves. 569; 1 Mer. 417; Laroche *v.* Davies, 1 Jur. 574; Chambers *v.* Brailsford, 18 Ves. 368; 19 Ves. 652; 2 Mer. 25.

12. That the construction cannot be strained, to bring a devise within the rules of law; but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid; and therefore the court has adhered to the literal language of the testator, though it was highly probable he had written a word, by mistake, for one which would have rendered the devise void.

13. That favor or disfavor to the object, ought not to influence the construction. But see Noel *v.* Weston, 2 V. & B. 269, 271.

14. That words are, in general, to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected; and they are, in all cases, to receive a construction which will give them all effect, rather than one that will render some of them inoperative; and, of two modes of construction, that is to be preferred which will prevent a total intestacy. Mowatt *v.* Carow, 7 Paige, 328; Rathborn *v.* Dyckman, 3 Paige, 9; Jones *v.* Doe, 1 Scam. 276; Leavens *v.* Butler, 8 Post, 380; Doe *v.* Thomas, 1 M. & G. 335; Doe *v.* Green, 2 Jur. 859.

15. That, where a testator uses technical words, he will be presumed to employ them in their legal sense, unless the context contain a clear indication to the contrary. Vauchamp *v.* Bell, 6 Madd 343; Den *v.* Blackwell, 3 Green, 386; Read *v.* Backhouse, 2 Rus. & My. 546; Jesson *v.* Doe, 2 Bligh, 1; 5 M. & S. 95; Langham *v.* Sandford, 2 Mer. 22. [Thus "bequeathe" may be construed "devise." Dow *v.*

collected from the scope of the whole will compared with its several parts; for courts of justice cannot make a will for the party, nor interpret it by any arbitrary rule, but that mode of

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Dow, 36 Maine, 211; Ladd *v.* Harvey 1 Foster, (N. H.) 514; and "heirs" "legatees," Collier *v.* Collier, 3 Ohio, (N. S.) 369; "vested" held to mean "vested indefeasibly," or "not liable to be devested." Poole *v.* Bott, 17 Eng. Law & Eq. 13; Evans *v.* Godbold, 6 Rich. Eq. (S. C.) 26; Lasher *v.* Lasher, 13 Barb. 106. And parol evidence cannot be received to show in what sense the testator uses well-settled terms of law. Aspden's Estate, 2 Wallace, Jr. 368.]

16. That words, occurring more than once in a will, shall be presumed to be used always in the same sense, unless a contrary meaning appear by the context, or unless the words be applied to a different subject. And upon the same principle, where a testator uses an additional word or phrase, he shall be presumed to have an additional meaning. Ridgeway *v.* Munkittrick, 1 Dru. & War. 84.

17. That words and limitations may be transposed, supplied, or rejected, where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the words. Covenhoven *v.* Shaler, 2 Paige, 122; Lynch *v.* Hill, 6 Munf. 114; Brailsford *v.* Heyward, 2 Desau. 32; Sherratt *v.* Bentley, 2 My. & K. 149; Hamilton *v.* Boyles, 1 Brev. 414; Creswell *v.* Lawson, 7 G. & J. 227; Doe *v.* Nevill, 12 Jur. 181; Laroche *v.* Davies, 1 Jur. 574; White *v.* Barber, 5 Burr. 2703; Teatt *v.* Strong, 3 Bro. P. C. 219; 2 Burr. 910; Bartlett *v.* King, 12 Mass. 543; Selden *v.* King, 2 Call. 72; 1 Yeates, 413.

18. That words which it is obvious are miswritten, (as, dying *with* issue, for dying *without* issue,) may be corrected. (*Her* for *their*.) Keith *v.* Perry, 1 Desau. 353. (*If* he should die, for *when* he should die.) Smart *v.* Clarke, 3 Russ. 365.

19. That the construction is not to be varied by events subsequent to the execution; but the courts in determining the meaning of particular expressions, will look to alternate circumstances, in which they might have been called upon to affix a meaning to them.

20. That devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; though it may be conjectured, from circumstances, that the testator had the same intention in regard to both. There must be an evident intention to connect them; Right *v.* Compton, 9 East, 267; [yet the whole may be examined to ascertain the meaning of the testator in the devise or clause under consideration. Pratt *v.* Leadbetter, 38 Maine, (3 Heath,) 9.]

21. That where a testator's intention cannot operate to its full extent, it shall take effect as far as it can. Gallini *v.* Gallini, 3 Ad. & El. 341; 5 B. & Ad. 621.

22. That a testator is rather to be presumed to calculate on the disposition of his will taking effect, than the contrary; and accordingly, a provision for the death of devisees will not be considered as intended to provide for lapse, if another construction can be put upon it.

23. That a will of real estate, wherever it be made, or in whatever language it be written, must be construed according to the laws of the country where the property, upon which it is intended to operate, is situated. Bovey *v.* Smith, 1 Vern. 147; Trotter *v.* Trotter, 4 Bligh, N. S. 502.

construction is to be preferred which gives effect to every part of the instrument, so that each word may have its particular operation, and not be rejected, if any construction can possibly be put upon it. (*a*)

3. The *intention of the testator must be collected from the whole will, ex visceribus testamenti*, so as to leave the mind quite satisfied about what the testator meant. And as a will
136* of lands* must be in writing, such collection of the testator's intention must be derived from the will itself; for no averment, founded on parol evidence, can be admitted to explain any thing dubious in the will, except in a few instances, which shall be mentioned hereafter. (*b*)

4. *General words in one part of a will may be restrained by subsequent ones*, and shall be construed so as not to defeat the intention of the testator, where it can be collected from any other part of the will. But where there is a *manifest general intent, the construction should be such as to effectuate it*, though by that construction some particular intent may be defeated. (*c*)[1]

5. The construction must be such, that *the intent of the testator may be rendered consistent with the rules of law*, for otherwise every testator would make a new law for himself; the metes and bounds of property would be vague and indeterminate, which would end in its total insecurity. (*d*)

6. *Technical words* are presumed to be used *in the sense which the law has appropriated to them, unless the contrary appears.* But where the intention of the testator is plain, it will be allowed to control the legal operation of the words, however technical. (*e*)

7. *Introductory words* often assist in showing the intention of a testator; and the courts have laid hold of them, as they do of every other circumstance in a will, that may help to guide their judgment to its right and true construction. (*f*)[2]

(*a*) 2 Burr. R. 770. (2 Kenyon, 488.) 2 P. Wms. 282.
(*b*) 3 Burr. R. 1541. (Rowse's case, Lofft, 97. Hill *v.* Chapman, 1 Ves. 407.)
(*c*) *Infra*, c. 12 and 14. (*d*) 2 Burr. R. 1108. 1 Doug. R. 341.
(*e*) 2 P. Wms. 741. Doug. R. 341. (Den *v.* Blackwell, 3 Green, 386.)
(*f*) Cowp. R. 306, 637. (Brailsford *v.* Heyward, 2 Desau. 32. Barheydt *v.* Barheydt, 20 Wend. 576.)

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[1] See, as to the extent and limitations of this rule, *infra*, ch. 12, § 51, note.

[2] General introductory words, such as, "touching all my temporal estate," and the

8. The *particular situation of a testator*, the number of his children, the different kinds of property whereof he was possessed at the time of making his will, are circumstances from which arguments may be drawn respecting his intention.[1] And it has been determined, in several cases, that the same words may have a different construction, when applied to different kinds of property. (*a*)

9. An *heir at law shall not be disinherited by a will, unless there are express words, or a necessary implication*, to that effect; for the title of the heir, being founded on the laws of descent, which are certain, is therefore not to be defeated by an uncertain devise. (*b*)

10. A *dubious expression* in a will may be explained by a codicil, or even by a schedule annexed to such will. (*c*)

*11. It has been stated, that though all trusts are in *137
one sense executory, yet that there is a distinction between a trust created without any reference to a further execution of it, by a conveyance directed to be made, and a trust whose effect is referred to another conveyance, directed to be made for its final execution. In the case where a trust is created by will, without any reference to a further execution of it, the construction is the same as in devises of legal estates; but where a conveyance is directed to be made, the construction is more liberal, in order to carry into full effect the intention of the testator. (*d*)

(*a*) 1 P. Wms. 286. 4 Bro. C. C. 441. (Ambler *v.* Norton, 4 Hen. & Munf. 44.) 2 Vez. 616. Cowp. R. 833.

(*b*) Prec. in Cha. 473. Cowp. 99. 6 Dow, 22. (2 Binn. 19, 20.) [18 How. U. S. 385.]

(*c*) Hayes *v.* Foord, *infra*, ch. 14, § 11.

(*d*) Tit. 12, c. 1, ss. 87, 88. (Cudworth *v.* Hall, 3 Desau. 261.)

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like, though they may have some effect in the construction of the subsequent devises, are not of themselves sufficient to extend a devise for life to a fee. Goodright *v.* Stocker, 5 T. R. 13; *Infra*, ch. 11, § 81; Frogmorton *v.* Wright, 3 Wils. 414; Doe *v.* Buckner, 6 T. R. 612; Earl *v.* Grim, 1 Johns. Ch. 498; Ibbetson *v.* Beckwith, Cas. Temp. Talbot, 157; Forrest, R. 157; *Infra*, ch. 11, § 20–23; and see Smith *v.* Coffin, 2 H. Bl. 444; Finlay *v.* King, 3 Pet. 346. See also, Beal *v.* Holmes, 6 Har. & J. 205, where this rule is more fully expounded.

[1] For this purpose, family deeds, regarding the same property, are admissible, when referred to in the will; and other deeds, connected therewith, though not directly referred to, are also admissible, in aid of the interpretation of a complex will of various estates, particularly when involved in the intricacies of co-existing marriage settlements. Noel *v.* Noel, 12 Price, 216. And see Smith *v.* Bell, 6 Pet. 68; 1 Greenl. on Evid. § 287–291.

12. *Adjudged cases* may be argued from, in the construction of wills, where they establish general rules for discovering the intention of a testator, and where once a court of justice has determined the meaning of certain words, or forms of expression, the same effect will in all future cases be given to them; for the great object in matters of this kind is certainty; and Lord Mansfield has observed, that if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it, than if it were to be overturned. (*a*)

13. It has been truly said by Mr. Hargrave, that if courts, either of law or equity, in both of which the rules of interpretation must be the same, should indulge an unlimited latitude of forming conjectures upon wills, instead of attending to their grammatical or legal construction, the consequence must be endless litigation. Every title to an estate, that depended on a will, must be brought into Westminster Hall; for if once we depart from the established rules of interpretation, without a moral certainty that the meaning of the testator requires it, no interpretation can be safe till it has received the sanction of a court of justice; for how can a client or a purchaser be assured that the conjecture of the most able counsel, or the most experienced conveyancer, will be in all points the same as the conjectures of the Judges, or the Chancellor. (*b*)

14. In a modern case, Lord Kenyon said: "Had there not been such a current of authorities as we find in the books, since the passing of the Statute of Wills, on the construction of wills, to further, as it has been called, the intentions of devisors; perhaps it would have been better that the same strict words had been required in testamentary dispositions of land, as in
138* those *by deed; because then the language of passing estates would have been so familiar, that few questions would have arisen on wills. For it has been often observed, that few questions arise on the construction of deeds, when compared to those which daily arise on wills. But we are bound to consider the series of authorities on this subject as the law of the land; and it would be extremely dangerous now, to remove those landmarks of real property, on which mankind have acted for such a length of time." (*c*)

(*a*) 1 Burr. R. 233. Hodgson *v.* Ambrose, *infra*, ch. 14, § 9. *Supra*, ch. 8, § 29.
(*b*) Har. Tracts, 295. Fearne, Cont. Rem. 266. 1 Eden's R. 143, 367.
(*c*) 5 Term R. 561. (Kingsland *v.* Rapelye, 3 Edw. 1.)

15. Where there are *words in a will which have no meaning*, or which are evidently contrary to the general intention of the testator, they will be *rejected.*[1] And, on the other hand, *words omitted by mistake*, and which are absolutely necessary to effectuate the general intention, will be *supplied.* (*a*)

16. Sir W. Coryton devised, for the preserving and continuing his real estate in his name and blood, all his lands to trustees and their heirs, until his son John should attain his age of twenty-seven, and no longer, in trust in the mean time out of the rents and profits for paying legacies, and to lay out the residue in the purchase of lands of inheritance, to be settled in the same manner as the rest of his estate; and from and after the determination of the estate limited to them as aforesaid, and the full accomplishment of his son's age of twenty-seven, that his said trustees and their heirs should stand and be seised of all the lands devised to them and their heirs to the use and behoof of his said son John and his assigns, for and during the term of ninety-nine years, without impeachment of waste, and from and after the determination of that estate, to the use and behoof of his said trustees and their heirs, during the natural life of the said John Coryton, for preserving contingent remainders; but nevertheless to permit the said John Coryton to take the profits during his natural life; and from and after his decease, to the use and behoof of the first and every other son of the said John Coryton in tail male; and for default of such issue, to the use of the heirs of the body of the said John Coryton; and for want of such issue, to the use and behoof of his daughter, Susanna Elliot, in tail; and for default of such issue, to the use and

(*a*) Hawes *v.* Hawes, *infra*, c. 15, § 9. (Creswell *v.* Lawson, 7 G. & J. 227.)

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[1] But words are not to be rejected upon mere conjecture, nor unless they are actually irreconcilable with the rest of the will. The mere improbability that the testator could have meant what he has expressed, neither amounts to a cause for rejection, nor renders the devise void for uncertainty. Chambers *v.* Brailsford, 18 Ves. 368; 19 Ves. 652; 2 Mer. 25. And see, as to the rule, that the general intention is to overrule the particular intention, *Infra*, ch. 12, § 51, note. The subject of supplying, transposing, and changing words, is very fully treated in 1 Jarm. on Wills, ch. 17, p. [427]–[458], with Perkins's notes. See also, Rathbone *v.* Dyckman, 3 Paige, 9; Lee *v.* Pain, 4 Hare, 249, 254; Robinson *v.* Waddelon, 8 Sim. 134; Wright *v.* Denn, 10 Wheat. 204; [Rawson *v.* Clark, 38 Maine, (3 Heath,) 223; Dew *v.* Barnes, 1 Jones's Eq. (N. C.) 149; O'Neall *v.* Bpozer, 4 Rich. Eq. 22; Cleland *v.* Waters, 16 Geo. 496.]

behoof of his nephew, John Goodall, the plaintiff, for life, &c., taking the name of Coryton; with power to his trustees, until his son should attain his age of twenty-seven years, to make
139* *leases of the premises, and the like power to his son, upon his attaining the age of twenty-seven; with a power also to his trustees, so long as his son should continue under twenty-seven, to join with him in making a jointure, and after his son's attaining twenty-seven, then to make such jointure himself. (*a*)

The testator died in 1712, and his son Sir John Coryton died in 1739, without issue, having made his wife executrix and residuary legatee, who died in 1741, and devised the premises to the defendants, for the residue of the ninety-nine years' term, created by the will of Sir W. Coryton, considering it as an absolute interest for ninety-nine years in Sir J. Coryton, and not determinable upon his death; Susanna Elliot being also dead without issue.

The plaintiff brought his bill to be let into possession of the premises, insisting, that though, as the words of the will stood, there seemed to be an absolute ninety-nine years' term given to Sir John Coryton, yet that was only a mistake in the wording of the will, it never being the intention of Sir W. Coryton, the testator, that his estate should go into another family, or to any wife his son should happen to marry, which it would probably do by an absolute devise for ninety-nine years: whereas, by the whole scope of the will, his intent plainly appeared, to continue the estate in his own name and blood, and to give the same to his son only for a term of ninety-nine years, determinable upon his death.

Lord Hardwicke said, the question was, whether this was an absolute term, to end only by effluxion of time, or to cease upon the death of Sir J. Coryton. And, as on the one hand, it must be admitted that there were no express words to determine it, so on the other it must likewise be admitted, that it might be made determinable by other parts of the will, though not expressly limited to be so. This term was not limited to the executors and administrators of Sir J. Coryton, and though not much stress was to be laid on that, yet it was strange that in so verbose

(*a*) Coryton *v.* Helliar, 1745, MS. Rep.

a will, these words should be omitted, if the testator intended his son's representatives to take it. The estate, limited to trustees, was a sufficient estate of freehold to support the contingent remainders, and to preserve the estate to Sir John Coryton for his life, but not to preserve the term from forfeiture for his executors; but was just in the same manner as in a conveyance * where the term was determinable; and the *140 limitation also to the first and every other son was the same as in a common settlement. The construction, therefore, made by the plaintiff, answered every purpose of a settlement: and that made by the defendants only, left a dry reversion in the first and other sons, expectant upon a term which might last longer than the lives of the sons or grandsons. Had this been intended for an absolute term, to enable Sir J. Coryton to provide for his younger children, it would likewise have been proper to have provided against the forfeiture of the term, by the trustees, for so many years as were to come of the term; and if, as was admitted by the defendant's counsel, the limitation to the first and other sons, immediately following the limitation of the term, might have determined it upon the death of Sir J. Coryton, the interposing an estate to trustees for preserving contingent remainders, should not overturn the whole will, especially as that limitation to the trustees was unnecessary, there being an estate of freehold limited to them before. Indeed, before the Statute of Uses, an estate in feoffees and their heirs, to the use of A, for years, remainder to the right heirs of B, who was then living, the contingent remainder was good, because supported by the estate of freehold in the feoffees; but since the statute, it was otherwise, and therefore where the first limitation was for life, and a remainder was limited to trustees during the life of the tenant for life, for preserving contingent remainders, and upon further trust to permit the tenant for life to receive the profits to his own use, this was done that if tenant for life should, by making a feoffment, commit a forfeiture, the trustees should, notwithstanding, suffer him to receive the rents. But where the first limitation was only for years, the remainder to trustees, during the life of the tenant for years, was inserted purely to support the contingent remainders, which the estate for years could not do; but not with a view of preserving the remainders against

the tenant for years, when those very remainders would be void for want of a freehold to support them. At the time of this will made, Sir J. Coryton was but twenty-one; and if this was taken for an absolute term, from the time of his attaining twenty-seven, the testator, instead of giving his estate to his family, would have given it from them for 105 years; which would appear very harsh if Sir J. Coryton had had a son, who might thus
141 * have * been stripped by an executor. Now the plaintiff was in the same case, being directed to change his name forthwith; and to what purpose should he take the name immediately, if he be not to take the estate for 105 years? Had the testator intended this for an absolute term, there was no occasion to give powers of leasing or jointuring, as both might have been supplied thereout. For though it would not be strictly a jointure within the statute, yet it would be a good satisfaction of dower in equity; and it was absurd to suppose that he intended this son, whom he would not trust with his estate before twenty-seven, should have power to give the whole away for ninety-nine years, even before he was twenty-seven. It was said, that the testator might intend to give his son the power of disposing of the estate to the heir of the family, if he should so please, but there was no evidence of such intent; on the contrary, he meant to tie him up as fast as possible. And there was as little evidence of the testator's meaning he should have it, to provide for younger children. Then it was objected, that here was an absolute term given, which could not be varied or taken away by implication. But in King *v.* Melling, 1 Vent. 299, (*a*) we find an express estate for life enlarged to an estate tail; and the same in Langley *v.* Baldwin, for so was the opinion of the Court of C. B., though in 1 Ab. Eq. 185, by mistake, it is called only an estate for life; which distinguishes it from Bamfield *v.* Popham, 2 Vern. 427–449, where the limitation was to all and every the son and sons; and though it be said that an estate cannot be enlarged, yet do I find no rule, that an estate cannot be abridged by implication; and for instance, a devise to one and his heirs, and if he die without issue to remain over; this abridged the fee to an estate tail. A distinction was made between a necessary and a probable implication, which last only was said to be in this case;

(*a*) *Infra*, c. 14, § 59.

but there was no such thing as a natural necessary implication; that being the necessary consideration, which plainly appeared to be the testator's intent, as it was in Langley *v.* Baldwin. So in the present case, what could be more unnatural than to suppose the testator meant to give away his estate for 105 years; and though all he had hitherto said went only on the supposition of its being but an implication, as the defendant's counsel would have it, yet he thought the question expressly determined by other parts of the will. He thought the cases of Spalding *v.* Spalding, (*a*) * Cro. Car. 185, and Whalley *v.* Reede, *142 1 Lutw. 810, applicable to the present. And in Amhurst *v.* Litton, first heard in 1728, and decreed for the plaintiff; then reheard in 1729, and the former decree reversed; and, finally, in the House of Lords, it was admitted on all hands, that the testator had power to dispose of the terms; that the words of the devise were very strong, giving them to his mother, for her sole use and benefit; and was urged also to be a great circuity, if intended only to give her the sums secured by those mortgage terms, which might much more easily have been given in money; yet was the last decree affirmed, from the great improbability that the testator meant to give away and sever these long terms from the inheritance.

The authorities quoted for the defendants were, first, Lanesborough *v.* Fox, (*b*) which was decreed upon the too great remoteness of the executory devise; that of Amble *v.* Jones, which was clearly a fee upon a fee; and Moore, 7, which was likewise a very plain case. One general observation occurred on this will, that it was intended for a family settlement, wherein the limitations were framed as strict as possible. Now suppose this a marriage article, would the Court have decreed a settlement of an absolute term? Even in a conveyance executed, he was inclined to think the Court would have rectified it, because destructive of the whole settlement; as in Uvedale *v.* Halfpenny, (*c*) where the term for raising younger children's portions being by mistake placed behind the estate tail, the Court rectified it, although the son, tenant in tail, had suffered a recovery. A distinction was made between settlements and wills, which last it was said, must be taken as they are; but this must be understood

(*a*) *Infra*, c. 18, § 11. (*b*) *Infra*, c. 18, § 20. (*c*) Tit. 32, c. 20, § 32.

with some restriction, that the construction be not barely according to the words, but likewise according to the testator's intent; as in Sir J. Hobart *v.* Lord Stamford, where trustees for preserving contingent remainders were inserted, though not directed by the will; and if there was any doubt, the present case was stronger, because part was executory, as land was to be purchased with the profits.

Upon the whole, therefore, he was of opinion, that this was not an absolute term for ninety-nine years, but that it determined upon Sir John Coryton's death.

17. A person devised to his wife several freehold estates, until his son T. P. should attain the age of twenty-one years,
143 * in trust * to maintain him; and then devised the same to his said son T. P. in fee. But if it should happen that his said wife should be *ensient* with one or more children, at the time of his decease, and his said son T. P. should die without issue, before he attained the age of twenty-one years, such child or children being then living, he then devised the premises to his wife, till such child or children should attain their ages of twenty-one years, in trust to maintain them; and then devised the same to such children in fee. But if it happened that his son T. P. should die without issue, and before twenty-one, or that his wife should at the time of his decease, be *ensient* with one or more child or children, who should die without issue, under twenty-one, then he devised the premises to his wife for life, remainder to his nephews in fee. (*a*)

The testator, at the time of making his will, had only one child, the said Thomas; but after the making thereof, and before his death, he had two other sons born; namely, the plaintiffs, Edward and John. The testator died in 1759, his wife survived him, but was not *ensient* at the time of his death. T. P. died without issue, in 1766. A bill was filed in Chancery, by the widow, on behalf of herself and her two infant children; praying that a sufficient part of the rents and profits of the real estate might be applied for the maintenance and education of the two infants.

The Court directed a case, for the opinion of the Court of King's Bench—Whether, in the event that had happened, any

(*a*) White *v.* Barber, 5 Burr. 2703.

and what estate was vested in the widow, and the two infant sons of the testator.

The Judges of the Court of King's Bench certified as follows: —"We are of opinion, that the provision made by the testator, being for children which were to be born after the making of his will, he certainly *intended* to comprehend *all* the children which should be born of his then wife (whether *before* or *after* his decease); for we think that a father, in making an express provision for any children, which his wife should be *ensient* with at the time of his decease, could never intend to give his estate to such children, in exclusion of, or to his nephews (as the event has happened) in preference to, any child or children that might be born in his lifetime.

"We are of opinion therefore, that notwithstanding the defect of expression in this will, the children born before the *testator's death, are virtually included in the provision *144 so anxiously made by a parent for his posthumous children; and that upon the true construction of this will, the plaintiffs Edward and John will be entitled, from the testator's manifest intent, to take an estate in fee in the premises at their respective ages of twenty-one; and that in the mean time the plaintiff Eleanor, their mother, is entitled to hold the said premises, subject to the trust of the said will, for their maintenance and education." (*a*) [1]

18. The *word* "*or*" has been frequently *construed* "*and*," in a conjunctive sense; where the intention of the testator appeared to require such a construction.[2]

(*a*) Doe *v.* Micklem, 6 East, 486. Doe *v.* Stenlake, 12 East, 515.

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[1] This case has since been overruled in Blackiston *v.* Haslewood, C. B., Hil. T. 1851, (4 Law Rep. 76, N. S.) [2 Eng. Law & Eq. 308.] In this case, the testator devised an estate to his wife for life, remainder to his nephew in fee; *provided*, that if the wife, at the testator's decease, should be with child, the child, and not the nephew, should take the remainder. At the time of making the will, the testator had no child, and was expecting soon to die; but afterwards a child was born in his lifetime, and he made a *codicil* devising after-acquired property to such child. When the testator died, the wife was not pregnant. It was *held*, that the child had no estate under the will; and that, as there was no posthumous child, the devise to the nephew took effect.

[2] Where one devised all his property to his mother for life, and after her decease to his three sisters *or* their children; it was held, that the property must be considered as given to the three sisters *and* their children; so that the issue of a deceased sister might take. Penny *v.* Turner, 15 Sim. 368. And see, as to the transposition of "*or*" and

19. R. Baker devised lands to his son Richard, and his heirs forever; and if Richard died within the age of twenty-one years, *or*, without issue; that then the land should be equally divided amongst his three other sons. Richard the devisee had issue Mary, and died within age. It was resolved, that the word *or*, should be construed as *and*, in a conjunctive sense. (*a*)

20. A person devised his land to his son and his heirs, and in case his son should die before he attained the age of twenty-one, *or* have issue of his body, then over. The son lived to twenty-eight years, but died without issue. It was resolved, that the will should be construed, as if the words had been "and in case my said son shall happen to die before he attains his age of twenty-one, *and* have issue living." (*b*)

21. The words of a will were:—"I give the said premises to my grandson, his heirs and assigns; but in case he dies before he attains the age of twenty-one years, *or* marriage, *and* without issue, then and in such case" he devised the same to the defendant. The grandson attained twenty-one, and died, never having been married; and it was insisted that the attaining twenty-one, was a performance of the condition, and vested the estate absolutely in the grandson, under whom the lessor of the plaintiff claimed. Judgment was given accordingly, in the county palatine of Durham; whereof error was brought in the Court of King's Bench. After several arguments, the Court affirmed the judgment upon the authority of Price *v.* Hunt, where the word *or* was construed conjunctively. And they said, they would read this without the word *or*, as if it run:—"and if he dies before twenty-one, unmarried, and without issue;" which he did not do, for one of the circumstances failed. And all put
145* together * were but in the nature of one contingency; and it was considerable, that this was not a condition prece-

(*a*) Soulle *v.* Gerrard, Cro. Eliz. 525. (*b*) Price *v.* Hunt, Pollexf. 645.

"*and*," 1 Jarm. on Wills, ch. 17, p. 427–456, 2d ed. and the cases collected in the notes of Mr. Perkins. See also, Brewer *v.* Opie, 1 Call, 212; Jackson *v.* Jackson, 1 Vez. 217; Hetherington *v.* Oakman, 1 Y. & C. 299; Dobbins *v.* Bowman, 3 Atk. 408; [Lachlan *v.* Reynolds, 15 Eng. Law & Eq. 234; Morris *v.* Morris, 21 Ib. 152; Stapleton *v.* Stapleton, 11 Ib. 90; Linstead *v.* Green, 2 Md. 82; Janney *v.* Sprigg, 7 Gill, 197; Shands *v.* Rogers, 7 Rich. Eq. (S. C.) 422.]

dent, but to destroy an estate, devised by the former words in fee. (*a*)

22. A person devised two-thirds of his estate to his son M. P., to hold to him, his heirs and assigns forever. But in case his said son should happen to die before he should attain the age of twenty-one years, or without issue, then he gave and devised the said two-thirds to his wife. By a codicil, the testator, reciting this clause, proceeded thus: — "Now my further mind and will is, that in case my said son shall happen to die before the age of twenty-one, or without issue as aforesaid, and also in case of the decease of my said wife, then I give and devise the said two-third parts to all the sons and daughters of T. D." (*b*)

The son died after the age of twenty-one, but without issue; and the question was, whether the devise over to the mother should take effect, upon one of the contingencies happening only.

Lord Hardwicke said, he thought it a very plain case. The testator had a wife and a son living: If he had gone no further than the first clause, he had given him an absolute fee. But then followed the executory part. Upon the words in the codicil there could be no doubt at all; it was to go over, upon two contingencies; the words *as aforesaid* took in all the former disposition. Suppose he had said no more than, "in case my son died under twenty-one *as aforesaid*," would this have disinherited the issue, if the father had died under twenty-one, and gone over to the mother? By no means; for he would have supplied the words—and without issue; and should have been justified by the expression, *as aforesaid.* He held it to be a vested estate in fee in the son, as he arrived at his age of twenty-one; and that though he died without issue, yet it did not go over to the mother, but descended to his heir at law.

23. A woman devised a house to her son Robert, his heirs and assigns forever; and in case he should happen to die in his minority and unmarried, or without issue, she gave it over. (*c*)

Lord Hardwicke, held, that the estate was to go over only upon one contingency; that of Robert's dying during his minority, subject to the qualifications of his being unmarried, and without

(*a*) Barker *v.* Suretees, 2 Stra. 1175. *Ante*, s. 20. (*b*) Walsh *v.* Peterson, 3 Atk. 193.
(*c*) Framlingham *v.* Brand, 3 Atk. 390.

issue at his death; and consequently the estate vested absolutely in Robert, upon his coming of age. (*a*)

146 * * 24. A person devised to his brother Benjamin Smith all his real and freehold estates; but in case his said brother Benjamin should die before he attained the age of twenty-one years, or without leaving issue living at his death, then he bequeathed his real estate to his mother. Benjamin Smith the devisee, entered into possession of the devised premises, and attained his age of twenty-one years, but died without issue. (*b*)

The Courts of Common Pleas and King's Bench in Ireland determined, that as the devise over was intended only to take place on the happening of one contingency, consisting of two branches, namely, Benjamin's dying under twenty-one, and without leaving issue, and as in this view only the latter part of the contingency had happened, and the former branch becoming impossible, the devise over could not operate.

On a writ of error to the House of Lords, it was contended on behalf of the plaintiff in error, that the construction adopted in Ireland was so much against the language of the will, as to be the direct contrary to that which the will peremptorily directed. According to the words, the devise over was to operate on the happening of either of two events; either in the event of Benjamin's dying under twenty-one, or dying without leaving issue. But according to the construction in Ireland, the words of contingency were made to be,—"In case my said brother shall die before he attains twenty-one, and without issue." The testator's disjunctive *or* was struck out of the will, and instead of it, the conjunctive *and* was inserted. The testator's two contingencies were consolidated into one contingency; and so the testator was made to speak the very reverse of that which he had really spoken.

On behalf of the defendant in error, it was said, that the general intent of the testator, as far as it could be collected from the whole will, must prevail, even against any particular clause; which if taken separately might have or seem to have, a contrary tendency. Now in this case, the general intent of the testator appeared with sufficient clearness to have been, to prefer his brother Benjamin and his issue before his mother; and that the

(*a*) Brownsword *v.* Edwards, *infrà*, c. 20. (*b*) Fairfield *v.* Morgan, Dom. Proc. 1805.

mother was not to take, to the exclusion of the children of Benjamin. This intent, then, ought to be carried into effect, and it could not be carried into effect, without construing the word *or* in a conjunctive sense; since otherwise Benjamin might have *died under age, leaving children, and by reason of *147
his dying under age, the children would have been excluded. (*a*)

To give the word *or* a conjunctive sense, when the context and intent of the whole instrument required it, was neither a strained nor a novel construction. There was perhaps no word in the language of more equivocal effect than the word *or*. By a slight variation of the phrase, in almost any case, it might be made to have either a conjunctive or disjunctive operation. A devise over if A shall die before his attaining his full age, or day of marriage, did not take effect by strict grammar, if A either came to age or married; but change the expression to,—"If A shall die before attaining his full age, or (*before attaining his*) day of marriage;" then, in strict grammar, the devise over takes effect, unless both happen. Yet the words between the parentheses, which were used in the latter mode of expression, must be understood in the former, in order to make sense of the passage. The consequence was, that courts had at all times paid little attention to a word, the effect of which depended on distinctions so small and subtle; and had construed the sentence in that way which seemed most conformable to sense, without much attention to the conjunctive or disjunctive meaning of the particle used. This had been done even in acts of Parliament. In wills, it was grown into a settled rule of construction, that where there was a devise of an inheritance to any person, and a devise over, depending on his age, or having issue, whether these two events were connected by a conjunctive or disjunctive particle, the estate of the first taker is absolute, if either of the events take place; and this for one plain reason, expressed or implied in all the cases, namely, that otherwise if the first taker should die under age, leaving issue, such issue would be disinherited. (*b*) †

(*a*) Doe *v.* Halley, 8 Term R. 5.
(*b*) Denn *v.* Kemeys, 9 East, 366. Right *v.* Day, 16 East, 67.

[† For instances of bequests of personalty wherein "or" was construed "and," see

The judgment was affirmed.

25. [So, on the other hand, the *word* "*and*" has in some cases been *construed* "*or*," in order to effectuate the apparent intention of the testator.

26. Thus, where the devise was to trustees and their heirs upon trust, to receive the rents and profits until J. B.
148* should attain *twenty-one; and if he should live to attain the said age, *or* have issue, to him and the heirs of his body; but if he should happen to die before the age of twenty-one years, *and* without issue, then over. Lord Hardwicke held, that *and* should be construed *or* upon apparent intention, so that in the event of J. B. attaining twenty-one, and dying without issue, the remainder over, expectant on the estate tail in J. B., should take effect. (*a*) [1]

27. But in a subsequent case, very similar to the preceding, the devise was taken literally, and the word "*and*" was construed in its literal sense.

28. In the case referred to, the devise was to trustees and their heirs in trust for J. J., and the heirs of his body lawfully issuing forever; and if J. J. should happen to die before he attained his age of twenty-one years, *and* without issue, then over. J. J. attained twenty-one, but died without issue. (*b*)

On the authority of the preceding case, it was contended that "*and*" should be construed "*or*." Lord Ellenborough admitted, that the cases were very similar, and that the only distinction was, that the limitation over in Brownsword *v.* Edwards, was in favor of a daughter, who, without the construction in that case put upon the word "*and*" would have been unprovided for; nevertheless, his lordship decided, that in the principal case, the word "*and*" was to be taken literally. It seems, therefore, a

(*a*) Brownsword *v.* Edwards, 2 Vez. 243. (*b*) Doe *v.* Jessup, 12 East, 288.

Richardson *v.* Spraag, 1 P. Will. 433; Eccard *v.* Brooke, 2 Cox, 213; Horridge *v.* Ferguson, Jacob, 583; Read *v.* Snell, 2 Atk. 643, 645; Weddell *v.* Mundy, 6 Ves. 341; Monkhouse *v.* Monkhouse, 3 Sim. 119; and 2 Rop. Leg. 364, ed. 1828.]

[1] See also Jackson *v.* Jackson, 1 Vez. 215, and the cases collected by Mr. Perkins, in 1 Jarm. on Wills, [443], note 1, (2d ed.); Stubbs *v.* Sargon, 2 Keene, 272; Hetherington *v.* Oakman, 1 Y. & C. 299; Griffith *v.* Woodward, 1 Yeates, 319; Dobbins *v.* Bowman, 3 Atk. 408; Prebble *v.* Boghurst, 1 Swanst. 309, 330; Jackson *v.* Topping, 1 Wend. 388, 396.

question whether Brownsword *v.* Edwards is not overruled by the case last stated.†

29. For other instances in bequests of personal estate, in which "*and*" has been construed "*or*," see the authorities cited below;‡ and for others, in which the words "*and*" and "*or*" have been construed literally, see the authorities also cited in the note.] §

30. A *particular estate will be transposed*, and placed either *before or after some other estate given by the will, if such transposition be necessary to fulfil the intent of the testator. *149

31. A person devised lands to his eldest son for life, remainder to the first and other sons of his said eldest son in tail; remainder to two trustees for their lives, upon trust to support the said remainders. The Court of Chancery held, that the will should be construed so as that the estate devised to the trustees should precede the contingent remainders. (*a*)

32. Lord Coke says, where there are *two different devises of the same thing*, the *last* shall take place. Mr. Hargrave observes on this passage, that there is a great contrariety of opinion on this subject; that some hold with Lord Coke, that the second devise revokes the first; others think that both devises are void, on account of the repugnancy; but the opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties. It appears however to be now settled, that if two parts of a will are totally inconsistent, and cannot possibly be reconciled, the proper rule is that the latter shall prevail. (*b*)[1]

(*a*) Green *v.* Hayman, 2 Cha. Ca. 10.

(*b*) 1 Inst. 112, b. Plowd. 451. Owen, 84. 2 Atk. 374. Sims *v.* Doughty, 5 Ves. 243. 6 Ves. 102.

[† In Woodward *v.* Glasbrook, 2 Vern. 388, the word *or* was taken in its literal sense.]

[‡ Hepworth *v.* Taylor, 1 Cox, 112; Maberly *v.* Strode, 3 Ves. 450; Bell *v.* Phyn, 7 Ves. 454, 458.]

[§ Doe *v.* Cooke, 7 East, R. 269; Dillon *v.* Harris, 4 Bligh, N. S 321; Doe *v.* Rawding, 2 B. & Ald. 441; Longmore *v.* Broom, 7 Ves. 124; Newman *v.* Nightingale, 1 Cox, 341; Montagu *v.* Nucella, 1 Russ. 165; Gridlestone *v.* Doe, 2 Sim. 225; 2 Rop. Leg. 368, ed. 1828.] (Doe *v.* Jessup, 12 East, 288.)

[1] This rule is merely a resort in the last extremity, after all other rules of interpretation have been applied in vain, and the real intention of the testator still remains unascertained. See *ante*, tit. 32, ch. 12, § 26, note; 1 Jarm. on Wills, [412,] 2d ed., note by Mr. Perkins, and cases there collected. But how far the general intent may control

33. The general principles, which have been stated in Title 32, c. 24, respecting *perpetuities*, have been as fully adopted in the construction of wills, as in that of deeds;[1] so that it may be laid down, that lands *cannot be devised* in such a manner as to render them unalienable *for a longer period than a life or lives in being, and twenty-one years and some months after.* (*a*) †

34. It has been stated in a former Title, that a *condition of non-alienation* cannot, in a deed, be annexed to a grant in fee simple. This rule is also generally admitted in the construction of wills. But it has been held, in a modern case, that a condition of non-alienation, except to sisters or their children, annexed to a devise to two women and their heirs, was good. (*b*)

35. A condition of non-alienation, annexed to an estate tail, is also void.

36. An estate was devised to John Harris, in such words that he was held to take an estate tail; with a proviso, that if the said John Harris or his issue should at any time thereafter alienate, mortgage, encumber, or otherwise commit any act or deed whatsoever, whereby to alter, change, or defeat the same

(*a*) 1 Inst. 233, a. (*b*) Tit. 13, c. 1, s. 22. Doe *v.* Pearson, 6 East, 173.

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the particular intent, see the observations of Ld. Denman, in Doe *v.* Gallini, 5 B. & Ad. 621, quoted *infra*, ch. 12, § 51, note. Though two several devises be in words *primâ facie* repugnant; yet if, upon the whole will, and upon consideration of the subject of the devise, an intent of the testator can be discovered, the court will so interpret the apparently inconsistent words, as to fulfil the whole intention. Doe *v.* Nevill, 12 Jur. 181. And see, accordingly, Malcolm *v.* Malcolm, 3 Cush. 472.

[1] See, as to devises void, or not, for remoteness, Norton *v.* Fripp, 1 Speers, 250; Threadgill *v.* Ingram, 1 Ired. 577; Sutton *v.* Wood, Cam. & Nor. 202; Zollicoffer *v.* Zollicoffer, 4 Dev. & Batt. 438; Moore *v.* Howe, 4 Monr. 199; Mazyck *v.* Vanderhorst, 1 Bail. Eq. R. 48; Adams *v.* Chaplin, 1 Hill, Ch. R. 268; Brashear *v.* Macey, 3 J. J. Marsh. 91; Vawdrey *v.* Geddes, Tam. 361; 1 Rus. & My. 203, S.C.; Warren *v.* Coley, 10 Leg. Obs. 44; Judd *v.* Judd, 3 Sim. 525; Bland *v.* Williams, 3 My. & K. 411; Webb *v.* Webb, 2 Beav. 493; Newman *v.* Newman, 10 Sim. 51; Moneypenny *v.* Gering, 16 M. & W. 418; Case *v.* Drosier, 5 My. & C. 246; Browne *v.* Stoughton, 14 Sim. 369; Bull *v.* Pritchard, 5 Hare, 567.

See alse 1 Jarm. on Wills, ch. 10, sec. 2, p. [219]–[263,] 2d ed. by Perkins, where this subject is fully treated. [See also Harris *v.* Clark, 3 Selden, (N. Y.) 242; Jennings *v.* Jennings, Ib. 547; King *v.* Rundle, 15 Barb. 139; Duke of Cumberland *v.* Graves, 9 Ib. 595; McSorley *v.* McSorley, 4 Sandf. Ch. 414; McSorley *v.* Wilson, Ib. 515; Field *v.* Field, Ib. 528; Cox *v.* Buck, 5 Rich. 604; James *v.* Wynford, 17 Eng. Law & Eq. 444; Gooch *v.* Gooch, 8 Ib. 138.]

[† Seaward *v.* Willock, 5 East, 198; Beard *v.* Wescott, 5 Taunt. 392; 5 B. & Ald. 801; 1 Turn. 25; Mortimer *v.* West, 2 Sim. 274.]

* bequests and limitations, or any of them therein before *150
limited and appointed of the same premises, that then and in such case he, the said John Harris, and all and every such other person or persons so alienating, mortgaging, or otherwise encumbering, altering, changing, or defeating the same bequests, or any of them, should pay or cause to be paid, and he thereby charged the said premises with the payment of £2,000 unto such person or persons, and his and their heirs, who might, could, should, or ought next to take, by virtue or means of any of the bequests, devises, or limitations, thereinbefore by him given, devised, or bequeathed. (*a*)

Lord Keeper Henley held this condition to be void.

37. It has been shown in a former title, that shifting uses may be limited by will, as well as by deed; provided a perpetuity be not thereby created; and the cases in which this doctrine has been established are there stated. (*b*)

38. Although an *omission* will be *supplied*, for the purpose of effectuating the intention of the testator, where such intention is consistent with the rules of law; yet if the *intention* be to *create a perpetuity*, the *omission will not be supplied;* but such a construction will be adopted, as will carry the general intention into effect.

39. Joshua Brown devised lands to his nephew William Brown, the son of his brother Reginald, for and during the term of his natural life, and from and after the death of the said W. Brown; then to the first son of the body of the said W. Brown, and the heirs male of the body of such first son; and for want of such issue, then to the second, third, fourth, and every other son and sons of the said W. Brown, according to their seniority; and to the heirs male of the body of such second, &c. and other sons of the said W. Brown; and for want of such issue, to the second son of his brother Reginald, for and during the term of his natural life, and from and after the death of the said second son of his brother Reginald, then to the first son of the body of such second son of his brother Reginald, and to the heirs male of the body of such second son; and for default of such issue, to the third, fourth, fifth, and every other younger son or sons of

(*a*) King *v.* Burchell, 1 Eden, R. 424. *Infra*, c. 14.
(*b*) Tit. 16, c. 5, s. 26. Tit. 32, c. 23. Tit. 36, c. 8.

the said second son of his brother Reginald Brown, according to their seniority, and to the heirs male of the bodies of the
151 * said third, fourth, fifth, and other sons of the * said second son of Reginald; with remainder to the eldest or next son or sons of Reginald, for life; and after his or their deaths, to the heirs male of their bodies. (*a*)

Reginald Brown had no son but William, at the time of the testator's death, but afterwards had a second son named Thomas; William Brown died without issue male; and the question was, what estate Thomas Brown took under the will.

The Court of King's Bench was of opinion, that Thomas Brown took an estate tail. A writ of error was brought in the House of Lords; and the following question was put to the Judges:—"Whether Thomas, the second son of Reginald Brown, took any and what estate, under the will of Joshua Brown." Whereupon the Lord Ch. B. delivered their unanimous opinion—That Thomas, the second son of Reginald Brown, took an estate tail, under the will of Joshua Brown." Whereupon the judgment of the Court of King's Bench was affirmed.

40. In cases where a *perpetuity is attempted*, there is a material *difference between a deed and a will;* for in the case of a *deed*, all the limitations are *totally void;* but in the case of a *will*, the courts do not, if they can possibly avoid it, construe the devise to be utterly void, but expound the will in such a manner as to *carry the testator's intention into effect, as far as the rules respecting perpetuities will allow;* which is called a construction *cy pres.*[1]

41. A person devised his estate to the Drapers' Company and their successors, in trust to convey the same to his godson M. H. for life, and upon the death of the said M. H., to his first son for life; and so to the first son of that son for life, &c.; and if no issue male of the first son, then to the second son of the said M. H. for life, and so to his first son, &c. On a bill brought for an execution of the trusts of this will, Lord Cowper said, though an attempt to make a perpetuity for successive lives be vain, yet so far as is consistent with the rules of law, it ought to be com-

(*a*) Chapman *v.* Brown, 3 Burr. 1626. 3 Bro. Parl. Ca. 269. Cases and Opinions, vol. 2, 417.

[1] [In cases of devises to charitable purposes the doctrine of *cy pres* does not obtain in *North Carolina*. Bridges *v.* Pleasants, 4 Ire. Eq. 26.]

plied with: and therefore let all the sons of these Humberstons that are already born, take estates for their lives; but where the limitation is to the first son unborn, there the limitation to such unborn son shall be in tail male. (*a*)

42. In a modern case, where there was a devise of land to trustees in fee, in trust for A, an infant, for ninety-nine years, if * he should so long live; and after that term to *152 his first, second, third, and other sons, and the issue male of their bodies, for the like term of ninety-nine years, *as they* should be in seniority of birth, the Judges of the Court of K. B. certified that the devise to the first unborn son of A was good; but the subsequent limitations were void. (*b*)

43. So, where there is a proviso in a will, of which the effect would be to prevent a power of alienation for a longer time than the law allows, such proviso will be deemed void, and the rest of the will good.

44. Sir John Lade devised certain lands to trustees and their heirs, to the use of his cousin John Inskip, for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the use of the trustees and their heirs, during the life of Ann Nutt, in trust to apply the rents and profits for the benefit of such of her sons, or such other person, as for the time being should be in *esse*, and would be the next tenant for life, or in tail, by virtue of the limitations in his will, in case Ann Nutt were dead; and from and after her decease, then to the use of her first and other sons successively in tail; provided, that during the time the said John Inskip should be under the age of twenty-six, and so often, and during such time as the person who for the time being would, by virtue of the said will, have been entitled in possession to the devised premises, as tenant for life, or tenant in tail, should be under the age of twenty-six years, the trustees and their heirs should and might enter on the premises, and take the rents and profits and apply them to the following uses, viz.: to allow to such persons certain annual sums till they attain the age of twenty-six, and to lay out the residue in the purchase of lands, to be settled as the estate devised. (*c*)

(*a*) Humberston *v.* Humberston, 1 P. Wms. 332. *Vide* Pitt *v.* Jackson, 2 Bro. C. C. 51.
(*b*) Somerville *v.* Lethbridge, 6 Term R. 213. Beard *v.* Wescott, *ante*, § 33.
(*c*) Lade *v.* Holford, 3 Burr. 1416. 1 Black. R. 428. Amb. 479.

John Inskip died, leaving his wife *ensient* with a son, who while an infant, exhibited his bill in Chancery, praying to be let into possession of the estate, when he should arrive at the age of twenty-one. Lord Henley directed a case to be sent to the Court of K. B. for their opinion on this question:—Whether Rose Fuller, the heir of the surviving trustee, did, upon the birth of the plaintiff, take any and what estate in the devised premises by virtue of the said proviso.

153* It was contended, that no estate vested in the trustees, the *proviso being void; whether it meant to vest a determinable fee in the trustees, or a mere chattel interest: because, in the first case, it tended to a perpetuity, by taking away the power of alienation five years longer than the policy of the law admitted; in the latter case, it had the same inconvenience, and was in derogation of the legal powers of tenant in tail.

The Court of K. B. appears to have been of this opinion, for they certified that Rose Fuller did not take any estate in the premises devised, by virtue of the proviso in the will of the said testator.† [1]

45. It has been always held, that *no averment can be admitted to explain a devise*, as the construction of it *must be collected from the words of the will;* for it would be full of great inconvenience that none should know, by the written words of the will, what construction to make, or advice to give, but it should be controlled by collateral averments, out of the will. And this doctrine was fully established by the Statute of Frauds. (*a*) [2]

(*a*) Cheyney's case, 5 Rep. 68. Plowd. 345. 1 Mod. 310. (Comport *v.* Mather, 2 W. & S. 450.) 1 Nev. & Man. 567.

[† The doctrine of perpetuities will be more fully considered in the chapters respecting executory devises.—*Note to former edition.*]

[1] A testator devised lands to his wife for life, remainder to his five children in equal shares; "always intending that none of his children shall dispose of their part of the real estate in reversion, before it is legally assigned to them." It was held, that the children took a vested remainder, and that the restraint on their alienation was void. Hall *v.* Tufts, 18 Pick. 455. [See also Walker *v.* Vincent, 19 Penn. (7 Harris) 369.]

[2] As to the admissibility of Parol Evidence to alter or explain writings, see 1 Greenl. on Evid. ch. 15, per tot. As to the admissibility of the testator's declarations, to show that a will was obtained by fraud, or that its revocation or alteration was fraudulently prevented, see Smith *v.* Fenner, 1 Gall. 170. *Supra*, ch. 8, § 21, note.

46. Papers and writings were offered in evidence, to prove what was said to be the intention of a testator. But it was decreed, that they should not influence the construction of a will in writing; for that would be to make them part of the will itself. And it is expressly required by the Statute of Frauds, that every part of a will shall be in writing. (*a*)

47. The deposition of a person who prepared a will was offered to be read, to prove the declarations of the testator, at the time he gave the instructions for his will, respecting his intention of giving his wife the several devises and bequests mentioned in the will, over and above her jointure: but Lord Bathurst would not suffer such evidence to be read. (*b*)

48. In the case of an *ambiguitas latens*, *an averment, supported by parol evidence, is admissible*, to explain such ambiguity.[1] If therefore a testator, having two sons of the name of John, devises generally to his son John, there parol evidence will be admitted, to prove which John the testator meant. (*c*)

49. A person, being seised in fee, as heir of his mother's mother, devised the lands to trustees in fee, in trust to pay annuities; and the residue to go to the testator's right heirs, of his mother's side, forever. The testator had two heirs of his mother's side, *one who was heir of the mother's father, and the *154 other, heir of the mother's mother. Parol evidence was admitted to prove that the testator, when he made his will, declared that the heir of his mother's mother should have his estate, because it came from thence. (*d*)

50. Parol evidence has also been admitted to clear up a *mis-*

(*a*) Bertie *v.* Falkland, 1 Salk. 231.
(*b*) Broughton *v.* Errington, tit. 7, c. 3. 8 Ves. 22.
(*c*) Tit. 32, c. 19. 5 Rep. 68, b. Hob. 32.
(*d*) Harris *v.* Epis. Lincoln, 2 P. Wms. 135. Minshull *v.* Minshull, 1 Atk. 411. Doe *v.* Morgan, 1 Cr. & Me. 235.

[1] See, as to ambiguities, 1 Greenl. on Evid. § 297–301. [Parol evidence cannot be received to show that the word "children" was inserted in a will by mistake instead of "sons." Weatherhead *v.* Baskerville, 11 How. U. S. 329. Evidence of extrinsic circumstances, such as the amount and condition of the estate, &c., cannot be received to control the interpretation of the will. It is only admissible to explain ambiguities arising out of extrinsic circumstances. Allen *v.* Allen, 18 How. U. S. 385; Walston *v.* White, 5 Md. 297; President, &c. *v.* Norwood, 1 Busbee, Eq. (N. C.) 65; Spencer *v.* Higgins, 22 Conn. 521; Holton *v.* White, 3 Zabr. 330; Trustees *v.* Peaslee, 15 N. H. 317; Button *v.* American Tract Society, 23 Vt. (8 Washb.) 336.]

take in the description of a devisee. And Sir J. Strange, M. R., has said, that in no instance parol evidence should be admitted in contradiction to the words of a will; but if the words were doubtful and ambiguous, and unless some reasonable light were let in to determine that, the will would fall to the ground; any thing to explain, not to contradict the will, was always admitted. (*a*)

51. George Evans devised to his granddaughter, Mary Thomas, of Llechlloyd, in Merthyr parish, the reversion of a house. At the time of his death, the devisor had a granddaughter of the name of Eleanor Evans, who lived at Llechlloyd, in Merthyr parish; and a great granddaughter, Mary Thomas, an infant of two years, being the only person of that name in the family; but it appeared, that she lived at Green Castle in the parish of Llangain, four miles from Merthyr parish; in which latter parish she had never been in her life. (*b*)

At the trial, the plaintiff's counsel proposed giving parol evidence, to show a mistake in the name of the devisee; that when the will was read over to the devisor by Philips, the person who drew it, and who was dead, the devisor said there was a mistake in the name of the woman to whom the house was given; that Philips then said he would rectify it; but the devisor answered, there was no occasion, as the place of abode and the parish would be sufficient. To this evidence the defendant's counsel objected, contending that there was not that *ambiguitas latens* which authorized the receiving of parol evidence; that if the doubt had arisen from there being two persons of the name of Mary Thomas, parol evidence might be admitted, to explain which of them was meant; but here the inaccuracy of the description was not such as to raise a sufficient degree of doubt to let in the parol evidence, for *granddaughter* would properly enough signify *great granddaughter;* and the mistake of the residence was only in a matter of description, was perpet-
155 * ually varying, * and could not raise any doubt, where a name, not applicable to any other than the defendant, was used; which was a circumstance of the greatest weight in these cases.

(*a*) 2 Vez. 217. Stephenson *v.* Heathcote, 1 Eden, 38.
(*b*) Thomas *v.* Thomas, 6 Term R. 671.

Mr. Justice Lawrence received the evidence, subject to the opinion of the Court on its admissibility, in case the jury should be of opinion that the name *Mary Thomas* had, by mistake, been inserted, instead of *Eleanor Evans.*

The defendant's counsel then offered evidence of declarations made by the devisor at other times, previous to the making of his will, expressive of his regard for his great granddaughter the defendant, and of his intention of giving her the house in question. This was rejected by the Judge, who was of opinion, that nothing *dehors* the will could be received to show the intention of the devisor; which could only be collected from the words of the will itself, after the removal of any latent ambiguity there might be in the description of persons, or other terms used in the will.

The jury found for the heir at law, on the ground that the will was void for uncertainty. Upon a motion for a new trial, Lord Kenyon said, that as there were two parts of the description, not answering to Mary Thomas, who was named in the will, the Court was left to conjecture who was meant by the devisor; but the law would not allow an heir at law to be disinherited by conjecture. With regard to the other question, respecting rejection of evidence, the learned Judge did right in rejecting it; the supposed declarations having been made by the testator long before the will was made; though had they been made at the time of making the will, he should have thought them admissible in evidence. (*a*)

52. Where *parol evidence* is admitted to explain a will, it *may be encountered by parol evidence.*

53. On a motion for a new trial, in ejectment, wherein the lessor of the plaintiff was heir at law, and the defendant's title arose upon a will, which devised the premises to John Cluer, of Calcot, under whom the defendant claimed; the plaintiff gave evidence, that at the time of making the will, there were two John Cluers, father and son, and that therefore the devise was to the father, who died before the testatrix, and so the devise was lapsed and void. Upon which the defendant offered to
*prove by parol evidence that the testatrix intended to leave *156
it to John Cluer the son. But the Judge would not suffer

(*a*) 1 Maule & Selwin, 301. *Vide* Doe *v.* Brown, 11 East, 441.

it; and a verdict was found for the plaintiff. *Per totam curiam*, the Court was mistaken; the objection arose from parol evidence, and ought to be encountered by the same. (*a*)

54. [We may lastly observe, that in construing devises it makes no difference, that the testator has not the legal estate.] (*b*)

(*a*) Jones *v.* Newman, 1 Black. R. 60.
(*b*) Jervoise *v.* Duke of Northumberland, 1 J. & W. 573.

Note. In the treatise of Vice-Chancellor Wigram, on The Rules of Law respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills, (a work which is earnestly commended to the student's perusal,) the whole subject is examined with unsurpassed power and acumen. It is discussed under the following propositions, which are conclusively maintained, both on principle and authority.

I. "A testator is always presumed to use the words, in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

II. "Where there is nothing in the context of a will, from which it is apparent, that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

III. "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable.

IV. "Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the Court of the proper meaning of the words.

V. "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

VI. "Where the words of a will, aided by evidence of the materal facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—*see* Proposition VII.) will be void for uncertainty.

VII. "Notwithstanding the rule of law, which makes a will void for uncertainty, where the words aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—Courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition, (*i. e. person* or *thing* intended,) is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admisible to prove which of the persons or things so described was intended by the testator." See Wigram on Wills, p. 11–14.

This learned jurist deduces, synthetically, at the end of his work, these General Conclusions:—

I. "That evidence of material facts is, in all cases, admissible in aid of the exposition of a will.

II. "That the legitimate purposes to which—*in succession*—such evidence is applicable, are two: namely, *first*, to determine whether the words of the will, with reference to the facts, admit of being construed in their primary sense; and, *secondly*, if the facts of the case *exclude* the primary meaning of the words, to determine whether the intention of the testator is certain in any other sense, of which the words, with reference to the facts, are capable.—And,

III. "That intention cannot be averred in support of a will, except in the special cases, which are stated under the Seventh Proposition."

He insists upon the rule, "That the judgment of a Court, in expounding a will, should be simply *declaratory* of what is *in* the instrument;" and adds, in accordance with that rule,—that

I. "Every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare. And that,

II. "The only cases in which *evidence to prove intention* is admissible, are those in which the description in the will is *unambiguous* in its application to each of several subjects." Ibid. p. 183–184.

CHAP. X.

CONSTRUCTION—WHAT WORDS CREATE A DEVISE, AND DESCRIBE THE DEVISEES, AND THE THINGS DEVISED.

SECT. 2. *What words create a Devise.*
7. *Words of Advice or Desire do not create a Devise.*
14. *But sometimes raise a Trust.*
18. *Devises by implication.*
27. *What words necessary to describe the Devisees.*
37. *The word Heir.*
49. *The word Issue.*
52. *The words Sons, Children, Relations, &c.*
60. *The words House or Family.*
61. *What words necessary to describe the Things devised.*
62. *Lands, Tenements, and Hereditaments.*
66. *Messuage and House.*
SECT. 69. *The word Estate.*
72. *All my Rents.*
74. *All I am worth.*
76. *The word Legacy.*
81. *Residue or Remainder of Estate.*
90. *Effect of additional words.*
98. *Words applied against their technical meaning.*
101. *General words confined to Freeholds.*
117. *What words necessary to pass Reversions.*
132. *And Mortgages or Lands held in Trust.*
142. *And Equities of Redemption.*

SECTION 1. HAVING stated the general rules by which devises are construed, it will now be necessary to inquire, I. What words are necessary to create a devise. II. What words are necessary to describe the devisees. III. What words are necessary to describe the property intended to be devised. And IV. What words are necessary to denote the quantity and nature of the estate intended to be devised.[1]

2. With respect to the *words necessary to create a devise*, the *proper and technical words* are, "*give and devise;*" but *any other words* which sufficiently show the intention of the testator to dispose of all, or any part of his lands or real estate, *will be sufficient for that purpose.*

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[1] A devise of lands is, in all cases, considered as a specific devise, whether the description of the lands be specific or general in its terms, either to a particular devisee, or to the residuary legatee. Wyman *v.* Brigden, 4 Mass. 151.

*3. A person having conveyed his estates to feoffees, to his own use, before the Statute of Uses, made his will after that statute, and also after the Statute of Wills, by which he willed that his feoffees should make an estate to W. N. and the heirs of his body. This was adjudged to be a good devise of an estate tail to W. N., the intention being clear. (*a*) *158

4. A, seised of lands in fee, and having issue two sons, B and C, devised several estates to B, his eldest son; and directed that B should renounce all his right in Blackacre, of which the devisor was then seised, to C. This was adjudged to amount to a devise to C in fee. (*b*)

5. A person, after giving by his will an annuity of £200 a year to his wife, and £6,000 to each of his younger children, his just debts being first paid; appointed three persons "as trustees of inheritance for the execution hereof." The question was, whether the trustees took any estate in the testator's real property, so as to render the same chargeable with the annuity and legacies. The Judges of the Court of Common Pleas certified, that the trustees took no interest in the real estates. Lord Eldon being dissatisfied with this certificate, directed a case to the Court of King's Bench, who certified, that the trustees did take an estate. Lord Eldon confirmed the opinion of the Court of King's Bench, and observed, it was a material fact, that the testator must have known, when he made his will, that his personal estate was insufficient to answer its purposes. (*c*)

This decree was affirmed by the House of Lords.

6. A mere recital in a will does not operate as a devise; and therefore in a case where a person, being tenant for life, remainder to his wife for life, remainder to his own right heirs, made his will, in which he said, "My lands by Woolwich, my wife is to enjoy for her life; after her death, of right it goeth to my daughter Elizabeth, forever, provided she hath heirs." It was determined that nothing was *devised* to Elizabeth; for the will did not give her any estate, but only recited that it was to go to her. (*d*)

7. *Words of advice, recommendation, or desire, do not create a devise;* nor will they even operate so as to *raise a trust* in equity,

(*a*) Bro. Ab. Devise, pl. 48. (*b*) Hodgkinson *v.* Star, cited 1 Ld. Raym. 187.
(*c*) Trent *v.* Trent, 1 Dow, 102.
(*d*) Wright *v.* Wyvell, 2 Vent. 56. Right *v.* Hammond, 1 Com. R. 232.

unless the *property is certain*, and the *persons* to whom it is given *clearly described;* and even in that case, such words are not in general deemed imperative or legatory, where they are
159* *inconsistent with the antecedent right or interest devised to that person to whom they are addressed; for in such cases, the subject-matter of the recommendation having been once absolutely devised away, it cannot be presumed that the testator intended to use the subsequent words of recommendation in a legatory sense, which would be to construe his will as inconsistent with itself, in one and the same sentence.[1]

8. A person gave *all his estate* to his wife; and then said, "I desire and request my said wife to give all her estate, which she shall have at the time of her death, to her and my nearest relations, equally among them." (*a*)

Lord Harcourt said, the words of the will being so general, both with respect to the money, and the persons to take it, did not amount to a devise; but was only a recommendation to the wife, to make such a disposition. But if he had desired that she should have given to a particular person, it would have been a good devise, and a trust.[2]

9. Lady Bland devised her manor of Withington, subject to her debts and charges, to her son Sir John Bland, his heirs, executors, administrators, and assigns, forever; and did thereby

(*a*) Palmer *v.* Schribb, 8 Vin. Ab. 289.

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[1] See *infra*, § 17, note. Though the words "*it is my wish*," in a will, generally operate as words of bequest or gift, yet they will be construed as merely an inclination of the mind, and not as a positive direction or act of the will, where a different construction would produce inconsistency and repugnance. Brunson *v.* Hunter, 2 Hill, Ch. R. 490. The words, "in trust, *in the first place*," are generally deemed words of order and method, and not of priority of obligation, where their import is not otherwise determined. Nash *v.* Dillon, 1 Moll. 236. [Words in a will, expressive of desire, recommendation, and confidence, are not words of technical, but of common, parlance, and are not, *primâ facie*, sufficient to convert a devise or bequest into a trust. Pennock's Estate, 20 Penn. (8 Harris,) 268; Tolson *v.* Tolson, 8 Gill, 376; Cowman *v.* Harrison, 17 Eng. Law & Eq. 290.]

[2] Where, after a devise of *all his property* to his wife, the testator "*earnestly conjured*" her to make provision for their only child and granddaughter, it was held no trust. Winch *v.* Brutton, 8 Jur. 1086. But where, after a bequest of property to her two sons, the testatrix added,—"But I most earnestly wish that my said sons may give or settle their respective shares on their respective daughters, in preference to their sons,"—*quære*, whether these words were imperative, or merely precatory. Young *v.* Martin, 2 Y. & C. 582; and see Knight *v.* Broughton, 11 Cl. & Fin. 513.

earnestly request her said son, that in case of failure of issue of his body, he would sometime in his lifetime, either by will, or any other writing, convey and settle the said real estate, so devised by her to him, or so much thereof as he should stand seised of at the time of his death, so and in such manner as that after failure of issue of his body, the same might come to be enjoyed by her daughter, and the heirs of her body; with several remainders over. (*a*)

Sir J. Bland disposed of the manor of Withington by his will.

Lord Hardwicke said, that in law, Sir John Bland clearly had a power of disposing; the devise being to him and his heirs, not subject to any trust; but whether he had such an estate in equity was the doubt; which depended upon the request in Lady Bland's will, whether imperative or not; for if it was the former, Sir J. Bland must then be considered as a trustee for the uses in the will. In order to make such construction, the party must declare his will, and not leave it purely to the option of the devisee, whether he will or will not give the estate. There had been many cases in the Court of Chancery where clauses directory had been taken for a disposition; as in those of Mason * *v.* Limbery, and Massey *v.* Sherman, where there * 160 were the words *trust and confidence.* But as it was so in some instances, it might be otherwise in others; and the request to be complied with barely at the devisee's discretion. In the present case, he thought Lady Bland did not mean her request to her son as imperative, but discretionary; for he was not desired to settle any part of the lands, but might sell the whole if he pleased; and this was a bare request, not obligatory, but subject to his judgment, as to such parts as he should die seised of. He might have sold them for a valuable consideration, might have advanced a son or daughter in marriage with them, or put them to any other use he should think fit. It was said that the debts and charges, to which the lands were liable, answered the doubt arising from the words *so much.* But the payment of debts and legacies, had no sort of connection with, and bore no relation to, the time of his death; which was the only point of time to which the request related. And this brought it very near to the case of the Attorney-General *v.* Hall, before Lord King; where

(*a*) Bland *v.* Bland, Hil. 1745. MSS. Rep.

it was held, that the absolute property vested in the son, and that he might dispose of it. Here, it was not a bare power, but the fee itself that was given; and his power of disposing was not collateral, but flowed from the nature of the estate given him. He was, therefore, of this opinion, upon the penning of the will, by which he did not mean to contradict former cases, wherein there was a desire to settle a particular thing; here being no such desire, either as to any particular part, or the whole, but all absolutely left in Sir J. Bland's power, to dispose of or not, as he should think fit. (*a*)

10. Sir E. Cunliffe devised certain sugar-houses and stock in trade to his son Sir E. Cunliffe, the plaintiff's brother; nevertheless, in case Sir E. Cunliffe should die without a son, he *recommended* it to him to give and devise the said premises to the plaintiff. It was held by the Lords Commissioners, Aston and Smythe, that the word "*recommend*" was not sufficient to raise a trust in favor of the plaintiff. (*b*)

11. A testatrix gave her fortune to A; and if he should die without issue, she *recommended* it to him to do justice to B and her children, if he should think them worthy of it. But if any unforeseen accident should make the whole, or any part,
161 * acceptable *or serviceable to him, he might dispose of it, if he should think fit. It was held to be no trust. (*c*) †

12. R. Harland, being seised in fee of the manor of Sutton, devised to his eldest son Philip, for life, with remainder to his first and other son, in tail male. Philip entered upon this estate; and being possessed of leasehold estates in Sutton, some for lives, and others for years, by his will gave his leasehold estate for lives to the trustees of his father's will, to the same uses to which the lands devised by the father's will were limited, so far as by law he

(*a*) *Infra*, s. 15. Fitzg. 314.

(*b*) Cunliffe *v.* Cunliffe, cited Prec. in Cha. 201, note, Finch's ed. S. C. Amb. 686. See 2 Ves. 532. 3 Ves. 7. (*c*) Le Maitre *v.* Bannister, cited Prac. in Cha. 201, n. Finch's ed.

† [To the preceding cases the following may be added as falling within that class where the recommendation was not held to amount to a trust, on account of the property in respect of which the recommendation was given, not being distinctly ascertained. Attorney-Gen. *v.* Hall, Fitz. Rep. 314, cited in Flanders *v.* Clark, 1 Vez. 9; Wynne *v.* Hawkins, 1 Bro. C. C. 179; Sprange *v.* Barnard, 2 Bro. C. C. 586; Wilson *v.* Major, 11 Ves. 205; Bull *v.* Kingston, 1 Mer. 314; Eade *v.* Eade, 5 Mad. 118; Curtis *v.* Rippon, Ib. 434; Abraham *v.* Alman, 1 Rus. 509; Bourn *v.* Gibbs, 1 Rus. & Myl. 614.]

could. And then followed this clause,—"All my other leasehold estates in the parish or township of Sutton, I give to my brother, J. Harland, forever, hoping he will continue them in the family." (*a*)

(John entered on the estate, and died, having devised these leasehold estates to his widow, who afterwards married the defendant, Trigg. Whereupon Richard, the third brother, filed this bill, claiming the estates, as being next in remainder, under the will of his father.)

Lord Thurlow held, that the will in this instance did not import a devise, as the words did not clearly demonstrate an *object.*[1]

13. [In addition to the case above stated, the reader is referred to Sale *v.* Moore, and which falls within the class where the recommendation failed to constitute a trust, on account of the objects of the testator's bounty not being distinctly ascertained.] (*b*)

14. Notwithstanding the authority of the preceding determinations, there are *some cases* in which *words of desire and request* have been held to be imperative and legatory, and consequently to *create a trust;* but that was only where the property was certain, and the objects of the testator's bounty clearly pointed out.

15. A person devised a copyhold to his wife in fee; adding these words, "not doubting but that my wife will dispose of the same to and amongst my children, as she shall please." This was held by Lord Hardwicke to be a trust for the children, as she should appoint. (*c*)

16. E. Wortley devised his collieries and coal mines to trustees, *their heirs, executors, administrators, and *162

(*a*) Harland *v.* Trigg, 1 Bro. C. C. 142.
(*b*) 1 Sim. 534. See also Heneage *v.* Lord Andover, 10 Price, 230.
(*c*) Massey *v.* Sherman, Amb. 520.

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[1] This was again stated by Lord Thurlow, as the sole ground of his decision of Harland *v.* Trigg, in the subsequent case of Nowlan *v.* Nelligan, 1 Bro. Ch. C. 491. He said that the *words* were sufficient to raise a trust, had the *object* been certain. See the cases cited in the notes of Mr. Belt and Mr. Eden to the principal case, 1 Bro. Ch. C. 142; Wright *v.* Atkyns, 17 Ves. 255, 262; 19 Ves. 299; Coop. Ch. C. 255, S. C. See also Coop. Ch. C. 111, 121, 122.

assigns, upon trust, to convey and dispose of the same in such manner as his daughter, whether sole or covert, should direct or appoint, by any writing or writings under her hand and seal. And in a subsequent part of the will, the testator declared, that although his meaning was to give his said daughter the absolute disposal of the said collieries, to prevent the expense and trouble that must attend the management of affairs of such a nature under the direction of the Court of Chancery, he requested his said daughter to direct the money arising therefrom to be applied in such manner as he had directed the same, in default of her direction and appointment. (*a*)

A question having arisen on the construction of this will, whether Lady Bute had an absolute power of disposing of the collieries, Lord Henley declared, that the testator did not intend to empower Lady Bute to direct the trustees to dispose of the premises for her absolute benefit, or without consideration; but that he intended only to give her a power to have the same sold, and that the money arising therefrom should be applied to the purchase of lands, in the same manner as the clear profits of the premises, in case she had made no appointment. And decreed accordingly, which was affirmed by the House of Lords.

17. A testator devised all his manors, &c., unto his mother and her heirs forever; in the fullest confidence that, after her decease, she would devise the property to his family. (*b*)

It was decreed by Sir W. Grant, M. R., that the words were sufficient to raise a trust, the word "*family*," in a devise of real property, meaning the same as "*heir at law*." †

(*a*) Bute *v.* Stuart, 1 Bro. Parl. Ca. 476. (*b*) Wright *v.* Atkyns, 17 Ves. 255. 19 Ves. 299.

[† In Doe *v.* Wrighte, 2 B. & Ald. 710, a devise, accompanied with a desire that the devisee would convey to some charitable uses, was held void.—*Note to former edition.*]

[The following are the principal cases in which words of recommendation have been considered *imperative*, and therefore amounting to a trust for the object of the testator's bounty; although they chiefly relate to bequests of personalty, the Editor deems it advisable here to refer to them, as they apply not only to bequests of chattels personal, but bequests of chattels real, a portion of the law of real property strictly coming within the professed scope of the present work. Where words of *desire* are used, Mason *v.* Limbury, cited Vernon *v.* Vernon, Amb. 4; Eales *v.* England, Pr. Ch. 200; Harding *v.* Glyn, 1 Atk. 468; S. C. 5 Ves. 501; 8 Ves. 571; 1 Turn. & R. 161. *Not doubting*, Massey *v.* Sherman, Amb. 520. *Request*, Nowlan *v.* Nelligan, 1 Bro. C. C. 489; Pierson *v.* Garnet, 2 Bro. C. C. 226; Pr. Ch. 201, note. Ed. Finch. *Recommend*, Malim *v.*

*18. The Courts have in some instances allowed of a *163
devise by implication, (†) where it has been very apparent, *in order to support and effectuate the intention of the testator;* but

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Keighley, 2 Ves. 333; Horwood *v.* West, 1 Sim. & Stu. 387; Dashwood *v.* Peyton, 18 Ves. 41; Broad *v.* Bevan, 1 Russ. 511, note. *Authorize and empower.* Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192. *Will and desire,* with power of selection. Forbes *v.* Ball, 3 Mer. 437; Birch *v.* Wade, 3 Ves. & Bea. 198; Tibbits *v.* Tibbits, 19 Ves. 656; 1 Jac. 317; Cruwys *v.* Colman, 9 Ves. 319. *Entreat,* with power of selection. Prevost *v.* Clarke, 2 Mad. 458. The following cases form a class wherein the above words were held not to be *imperative,* and therefore not raising a trust. Bull *v.* Vardy, 1 Ves. 270; Meggison *v.* Moore, 2 Ves. 630; Paul *v.* Compton, 8 Ves. 375; Robinson *v.* Smith, 6 Mad. 194; 1 Russ. 509; Meredith *v.* Heneage, 1 Sim. 542; Foley *v.* Parry, 5 Sim. 138.]

In addition to the cases collected by Mr. White, in the preceding note, the student is referred to those cited in Lewin on Trusts, ch. 5, § 2, p. 77–81; and in 2 Story, Eq. Jur. § 1068–1073. On the doctrine itself, the last-mentioned learned author makes the following observations:—

"The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire, into positive and peremptory commands, is not a little difficult to be maintained, upon sound principles of interpretation of the actual intention of a testator. It can scarcely be presumed, that every testator should not clearly understand the difference between such expressions, and words of positive direction and command; and that, in using the one, and omitting the other, he should not have a determinate end in view. It will be agreed on all sides, that, where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party, enjoying his confidence and favor; and where his expressions of desire are intended, as mere moral suggestions, to excite and aid that discretion, but not absolutely to control or govern it; there, the language cannot, and ought not to be held to create a trust. Now, words of recommendation, and other words, precatory in their nature, imply that very discretion, as contradistinguished from peremptory orders; and, therefore, ought to be so construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear, that they are designed to be used in a peremptory sense.

"Wherever, therefore, the objects of the supposed recommendatory trust are not certain or definite; wherever the property, to which it is to attach, is not certain or definite; wherever a clear discretion and choice to act, or not to act, is given; wherever the prior dispositions of the property, import absolute and uncontrollable ownership; in all such cases Courts of Equity will not create a trust from words of this character. In the nature of things, there is a wide distinction between a power and a trust. In the former, the party may, or may not, act in his discretion. In the latter, the trust will be executed, notwithstanding his omission to act." See 2 Story, Eq. Jur. § 1069, 1070. *Supra,* § 7, note.

[†In Patton *v.* Randall, 1 Jac. & Walk. 196, Sir W. Grant, M. R., observes, "Before an implication is raised, there must be an absence of express devise; and in opposition to a devise, it can never be raised."]

in cases of this kind, *the implication must be a plain, and not merely a possible or probable one;* for the title of the heir at law being plain and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification. And Lord Eldon has said—"With regard to that expression, '*necessary implication*,' I will repeat what I have before stated, from a note of Lord Hardwicke's judgment in Coryton *v.* Heliar, that in construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed." (*a*)[1]

19. The first case in which a devise by implication was allowed, arose in 13 Hen. VII. A man devised his goods to his wife, and that after her decease *his son and heir* should have a certain house. It was determined that this was a good devise of the house to the wife for life, by implication; for by the express words of the will, the heir was not to take it till after the death of the wife; therefore, if she did not take it, no one else could. (*b*)

20. It was also formerly held, that a devise to a stranger, after the death of the devisor's wife, would give the wife an estate for life by implication. But this determination has been repeatedly contradicted; because in this case two implications arise, the one, that the testator meant his lands should go to his wife; the other, that they should descend to his heir: and therefore the implication in favor of the wife being only a possible, and not a necessary one, the title of the heir must prevail. Thus
164* where a *person devised to A and his heirs, after the death of the devisor and his wife, it was determined that

(*a*) Moone *v.* Heaseman, Willes' Rep. 141. 1 Ves. & Beames, 466. *Ante*, v. 9.
(*b*) Bro. Ab. Devise, pl. 52. Cro. Jac. 75. Dyer *v.* Dyer, 1 Meriv. 414.

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[1] See on the subject of Estates arising by Implication, 1 Jarm. on Wills, ch. 18, p. [460]-[501,] Perkins's ed. Such devises are sustainable only upon the principle of carrying into effect the intent of the testator; and therefore unless, upon the whole will, it appears that such was his intention, no devise by implication will arise. Rathbone *v.* Dyckman, 3 Paige, 9. And see Jackson *v.* Martin, 18 Johns. 31. [A clause in a will "that in case my son Eli dies before the expiration of said lease, then the house and lot, called Oak Island, shall descend to my son Andrew," there being no express devise of Oak Island to Eli, is a devise thereof to Eli, by implication. Holton *v.* White, 3 Zabr. 330; Wright *v.* Hicks, 12 Geo. 155.]

the wife took nothing, but that the lands should descend to the heir, during her life. (*a*)

21. A copyholder devised underwoods to I. S. for twenty years after the death of his wife, to raise portions for his younger children. The question was, whether the wife took an estate for life by implication? (*b*)

Lord Nottingham said, where such a devise was made to the *heir*, there indeed an estate should arise to the wife by implication; but where it was devised to *a stranger*, as in this case, there, in the mean time, it should descend to the heir. (*c*)

22. A person having issue a son, who was his heir apparent, and two daughters, devised in these words: "If it happens that my son B. and my two daughters die without issue, then all my lands shall be and remain to my nephew D. and his heirs." It was held, I. That no express estate was by this will given to his children. II. That they did not take any estate by implication; because then it must either be a joint estate for life, with several inheritances in tail, or several estates tail in succession. The last it could not be, because it would be uncertain who should take first, who next, &c.; and the first it could not be, because the heir at law shall not be disinherited without a plain implication, which in this case there was not; for it was only a designation and appointment of the time when the land should come to the nephew; and therefore the lands descended to the heir at law. (*d*)

23. [Where a provision is made for a devisee or legatee, out of property real or personal, until a certain event, and nothing further is added, the Courts have adopted the implication, that when the event arises the devisee is to take.

24. Thus, where a testator bequeathed the residue of his real and personal estate to his executors, in trust for his son G. until he should attain twenty-one, and then directed that the fund should cease, Lord Keeper Henley held, that the testator intended G. should take the whole beneficial interest in the residue, and the bequest was the same as if the testator had said, I give the

(*a*) Higham *v.* Baker, Cro. Eliz. 15. Smartle *v.* Scholar, 2 Lev. 207. T. Jones, 98.
(*b*) Fawlkner *v.* Fawlkner, 1 Vern. 21.
(*c*) 1 P. Will. 38, 473. 3 P. Will. 305. 3 Vern. [572.]
(*d*) Gardner *v.* Sheldon, Vaugh. 259.

residue of my estate to trustees, in trust for G. until twenty-one, and then to G. and his heirs. (*a*)

165* *25. Again, where the happening of a given event is not provided for, but the *not* happening of the event is,—

26. As, where a testator bequeathed leasehold premises to Richard, until his son Thomas should attain the age of twenty-one, and no longer; but in case Thomas should *not* attain his said age, then over; and the testator directed his said premises might be quitted and delivered up as aforesaid by Richard accordingly. Thomas attained twenty-one, and entered into possession. Lord Ellenborough decided that he was entitled absolutely.] (*b*)

27. With respect to the *words that are necessary in a will to describe the devisees*, any words that are sufficient to denote the persons meant by the testator, and to distinguish them from all others, operate as a good description. (*c*) [1]

(*a*) Peat *v.* Powell, 1 Eden, 479. 2 Eden, 229.

(*b*) Goodright *v.* Hoskins, 9 East, 306. Tomkins *v.* Tomkins, mentioned in Goodtitle *v.* Whitby, 1 Bur. 234, and cited Doe *v.* Cundall, 9 East, 404. (*c*) Tit. 32, c. 20, s. 10.

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[1] In ascertaining the person intended as the devisee, it is material to ascertain whether any other person than the claimant sets up a title, not as heir, but as devisee. For if no other person appears in that character, the presumption is stronger in favor of the claimant. Thomas *v.* Thomas, 6 T. R. 676. It was partly on this ground, that in the case of Beaumont *v.* Fell, 2 P. Wms. 141, evidence was admitted to show that by "Catherine Earnley," in the will, as written by the attorney, the testator meant "Gertrude Yardley." It is also to be remembered, that the testator is presumed to prefer his own blood; and that a devise is always intended for the benefit of the devisee, and is to be liberally expounded, in his favor. Hence, in several classes of cases, persons have been let in as devisees, who were not within the precise terms of the will, but probably within the general meaning of the testator.—1. Where the person was within the reason and motive of the will; as, where the devise was to "children living" at the time of his decease, and a posthumous child is let in. Trower *v.* Butts, 1 Sim. & Stu. 181. So, under a devise to "the four sons" of A, who had only three sons and one daughter, it was held that the daughter might take. Lane *v.* Green, 15 Jur. 763. [So in a bequest to "my niece, the daughter of my late sister Sarah," the testator having had but one sister, named Sarah Ann, who had died fifteen years before, and who had never had any daughter, and but one child, a son, it was held that such son was entitled to take. In re Rickit's Trust, 21 Eng. Law & Eq. 66. See also, Bernasconi *v.* Atkinson, 23 Eng. Law & Eq. 207; Mostyn *v.* Mostyn, 19 Ib. 501; McBride *v.* Elmer, 2 Halst. Ch. R. 107; Voorhees *v.* Voorhees, Ib. 511; Baldwin *v.* Baldwin, 3 Ib. 211; New York Annual, &c. Mutual Assistance Society *v.* Clarkson, 4 Ib. 541; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Carter *v.* Balfour, 19 Ala. 814.]—2. Where the person is within the *legal* meaning of the words. Thus under a bequest to "first and second cousins," a grand-niece has been held entitled. Mayott *v.* Mayott, 2 Bro.

28. Thus, where there was a devise to Margaret, the daughter of W. K. The daughter's name was Margery. It was held she should take; *quia constât de personâ.* (*a*)

29. A person devised an estate to William Pitcairne, eldest son of Charles Pitcairne of Twickenham; who had an eldest son, but his name was Andrew. It was decreed that Andrew should take. (*b*)

30. A person devised all his lands in Kent and Sussex to one of his cousin Nicholas Amherst's daughters, that should marry with a Norton, within fifteen years. N. Amherst had three

(*a*) Gynes *v.* Kemsley, 1 Freem. 293.

(*b*) Pitcairne *v.* Brase, Finch, 403. Doe *v.* Huthwaite, 3 B. & Ald. 632. 2 Moore, 304.

Ch. Cas. 125; Silcox *v.* Bell, 1 Sim. & Stu. 301; Charge *v.* Goodyer, 3 Russ. 140. So, a daughter's son was held entitled to a bequest to "his son." 8 Vin. Abr. 310, pl. 9, per Newdigate, J., 2 Sid. 149. And a case has been mentioned, where a devise to "his nephews," the testator supposing the term to include only his brother's children, of whom there were only two, was held good to all who were legally his nephews, being about forty persons.—3. Where the claimant was familiarly called by the testator by the name in the will, though it was not his true name; no other person claiming as devisee. Such was the case of Beaumont *v.* Fell, *supra*, where Gertrude was familiarly called Gatty, which the scrivener probably mistook for Katy, and wrote out Catherine. See 1 Greenl. Evid. § 291. So, a devise to "his father," on proof that his father was dead at the time of making the will, and that the testator usually called his grandfather "father," was held good to the grandfather. 8 Vin. Abr. 310, pl. 7; 4 Leon, 74, cites 19 H. 8. So, a devise by a grandmother to "her daughter J. S.," whereas she is her daughter's daughter, is good to the granddaughter. Owen, 88, per Walmesley, J.—4. Where, otherwise, the gift can have no object, or will be defeated, for want of persons to take as devisees. Here, the rule is, that where there is a *total* want of persons to take, who properly and completely answer the description in the will, those who answer it incompletely, may be let in. Thus, for example, under a "devise to children," if there be no child living, grandchildren may be let in. Earl of Oxford *v.* Churchill, 3 Ves. & B. 69; Reeves *v.* Rymer, 4 Ves. 698. But not if there be any children living. Royle *v.* Hamilton, 4 Ves. 439; Crook *v.* Brooking, 2 Vern. 106; 2 Pow. Dev. 298, 299, by Jarman. So, as to nephews and grandnephews. Shelly *v.* Bryer, 1 Jac. 207; Faulkner *v.* Button, 1 Ambl. 514. And see Izard *v.* Izard, 2 Desau. 303; Ewing *v.* Handley, 4 Litt. 349; Tier *v.* Pennell, 1 Edw. 354. See also 2 Jarm. on Wills, ch. 30 and 31, 2d Am. ed. with the notes of Mr. Perkins. *Supra,* ch. 8, § 23; Lieber's Legal & Pol. Hermeneutics, p. 62; Dent *v.* Pepys, 6 Mad. 350; Connolly *v.* Pardon, 1 Paige, 291; Lee *v.* Pain, 4 Hare, 254; Richardson *v.* Richardson, 9 Jur. 322; Havergal *v.* Harrison, 7 Beav. 49; Blundell *v.* Gladstone, 11 Sim. 467; Queen's College *v.* Sutton, 12 Sim. 521; James *v.* Smith, 8 Jur. 594; Thompson *v.* Thompson, Ibid. 839; Newbolt *v.* Price, Ibid. 1112.

[A *bequest* of a residue "unto all the children of B, equally, when they shall severally attain the age of twenty-five years," includes all the children born before one attains that age, although born after the death of the testator, but does not include those born after one attains that age. Hubbard *v.* Lloyd, 6 Cush. 522.]

daughters, one of whom married with a Norton within the fifteen years. This was adjudged a good devise to her, notwithstanding the uncertainty; and that the law would supply the words, who shall *first* marry. (*a*)

31. It has been stated, that a bastard may be a devisee, but that he must, for that purpose, have gained a name by reputation, in order that the devisor may describe him.

32. A person devised an equal share of his estate to his two sons, James and Charles Rivers. Lord Hardwicke said, the question was, whether, as it appeared that James and Charles were two illegitimate children, this was such a description of their persons, as would entitle them to take under the will? In the case of a devise, any thing that amounted to a *designatio personæ* was sufficient: and though in strictness they were not his sons, yet if they had acquired that name by reputation, in common parlance, they were to be considered as such. It
166 * had * been said the testator had made a mistake in their names, and therefore they could not take; but the law was otherwise; for if a man was mistaken in a devise, yet if the person was clearly made out by averment to be the person meant, and there could be no other to whom it might be applied, the devise to him was good. (*b*)

33. It was held in a late case, that under a devise by a married man, having no legitimate children, "to the children which I may have by A, and living at my decease," natural children who had acquired the reputation of being his children by her, before the date of the will, were entitled, as upon the whole will intended, and sufficiently described. (*c*)

34. But in a subsequent case, Lord Eldon held, that under the description of children in a will, illegitimate children, existing at the date of the will, were not entitled, unless proved by the will itself to be intended; and that evidence could be received, only for the purpose of collecting who had acquired the reputation of children. (*d*)

35. [Nor consequently can natural children, born after the date of the will, take under a bequest to the issue of a particular per-

(*a*) Bate *v.* Amherst, T. Raym. 82.
(*b*) Rivers's case, 1 Atk. 410.
(*c*) Wilkinson *v.* Adam, 1 Ves. & B. 422. Bayley *v.* Snelham, 1 Sim. & Stu. 78.
(*d*) Swaine *v.* Kennerley, 1 V. & B. 469.

son: as where a bequest was to all the natural children of the testator's son, by Mrs. Heneage, Lord Parker, C., held, that children born after the will did not take. (*a*)

36. But a bequest may be made to a natural child of which a particular woman is *ensient*, without reference to any person as the father.] (*b*)

37. In consequence of the rule of law, that *nemo est hæres viventis*, an immediate devise to "*the heirs*" of a living person, would be void. But a devise to "*the heir*" special of a living person has been held good, where the word "*heir*" has been qualified by the words "now living," or some other words or circumstances have appeared in the will to manifest the testator's intention.[1]

38. A person devised to a trustee and his heirs, in trust to permit Robert Durdant to receive the rents during his life, and after his decease, to "the heirs male of the body of the said Robert Durdant," then living. It was adjudged, that this was a vested remainder in the only son of Robert Durdant; the words "*heirs male of the body then living*," being a sufficient designation of such only son, as much as if it had been to his heir apparent. (*c*)

39. A person devised the remainder of all his estate "to the heirs male of the body of his aunt Elizabeth Long," lawfully *begotten;" and gave a legacy of £100 to Elizabeth *167
Long. At the death of the testator, Elizabeth Long was living; and the question was, whether her eldest son could take under this devise. It was adjudged by the Court of Exchequer that he should take. Upon a writ of error in the Exchequer

(*a*) Metham *v.* Duke of Devon, 1 P. Will. 529. Arnold *v.* Preston, 18 Ves. 288.
(*b*) Earle *v.* Wilson, 17 Ves. 528. Gordon *v.* Gordon, 1 Mer. 141. 6 Mad. 292.
(*c*) Burchett *v.* Durdant, 2 Vent. 311.

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[1] See accordingly, Heard *v.* Horton, 1 Denio, 165. See also, 2 Jarm. on Wills, ch. 29, p. 1–23, (Perkins's ed.) For other cases of construction of the word "*heir*" and "*heirs*," see White *v.* Briggs, 2 Phil. 583; 17 Law J. Ch. 423; Daly *v.* James, 8 Wheat. 495; Smith *v.* Folwell, 1 Binn. 546; Harris *v.* Davis, 1 Coll. 416; 9 Jur. 269; Boydell *v.* Golightly, 9 Jur. 2.

"*Heirs*" may be understood to mean "*children*." Bowes *v.* Porter, 4 Pick. 198; Ellis *v.* Essex Mer. Bridge, 2 Pick. 243; Bryant *v.* Deberry, 2 Hayw. 356; [Fiske *v.* Keene, 35 Maine, (5 Red.) 349; Campbell *v.* Rawdon, 19 Barb. (N. Y.) 494; Aspden's Estate, 2 Wallace, Jr. 368; Lee *v.* Foard, 1 Jones's Eq. (N. C.) 125.]

Chamber, before Ch. Justices Parker and Trevor, this judgment was reversed. (*a*)

A writ of error was brought in the House of Lords, where the judgment in the Exchequer Chamber was reversed, and that of the Court of Exchequer affirmed; upon the principle, that the word *heir* had several significations. In the strictest sense, it signified one who succeeded to a dead ancestor; but it also signified, in a more general sense, an heir apparent, which supposed the ancestor to be living; and in this latter sense, the word *heir* was frequently used in statutes, law books, and records. As therefore the law gave several senses to this word, it would be hard, in this case, to expound it in the most strict and rigorous sense, which would destroy great part of the will; when by law it might have another sense, which would support the whole will, and the manifest design of the party. (*b*) [1]

40. A person devised to his son Richard Brooking, his heirs male, and to the heirs of his daughter, Margaret White, jointly and equally, to hold to the heirs male of Richard, lawfully begotten, and to the heirs of Margaret, jointly and equally, and their heirs and assigns forever. It was resolved, that this was a sufficient designation of the person, to make the son of Margaret take as her heir, living the mother. (*c*)

41. Lands were devised to a trustee, to receive and pay the rents and profits for the maintenance of the devisor's niece, Sarah, and the issue of her body, begotten or to be begotten during the natural life of the said Sarah; and from and after the decease of his niece Sarah, then upon trust for the use of the heirs of the

(*a*) Darbison *v.* Beaumont, 1 P. Wms. 229. (Whitney *v.* Whitney, 14 Mass. 88. Dingley *v.* Dingley, 5 Mass. 535.) (*b*) 3 Bro. Parl. Ca. 60.
(*c*) Goodright *v.* White, 2 Black. Rep. 1010, (cited and approved, 4 Pick. 209.) Doe *v.* Perratt, 5 B. & Cres. 48. S. C. 10 Bing. 198. (Reversed in Dom. Proc. 9 Cl. & Fin. 606.)

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[1] Where a testator, professing to dispose of all his estate, devised to one of his daughters the *improvement* of his homestead farm, "the said premises to be equally divided between all her legal *heirs* at her decease;" it was held, in Massachusetts, where the rule in Shelley's case is abolished, that the daughter took only an estate for life, and that her *children*, living at the *testator's* death, took a vested remainder in fee. Bowers *v.* Porter, 4 Pick. 198. And see Whitney *v.* Whitney, 14 Mass. 88; Bates *v.* Webb, 8 Mass. 448. [So where A makes a devise to B for life, and on the death of B to all his surviving children, all who survive the testator are intended, and they, at his death, take a vested interest in the estate. Martin *v.* Kirby, 11 Gratt. (Va.) 67.]

body of his niece Sarah, lawfully begotten or to be begotten, their heirs and assigns forever; without any respect to be had or made in regard to seniority of age or priority of birth. Sarah had a son and two daughters. The Court said, that the words, "*without any respect*, &c.," plainly showed an intent that the children of Sarah should take as purchasers. (*a*)

42. It has been already stated, that formerly, where there was *a limitation of a remainder in a deed to an *168 heir special, it was held, that he must answer both parts of the description; but that this doctrine had been altered by a modern decision. In the case of a devise, the same doctrine was held for a long time, but was denied in the following case. (*b*)

43. A person devised to his son for life, remainder to his first and other sons in tail male; and for want of such issue, to the heirs male of his body begotten. The devisor died, leaving a granddaughter, the daughter of his eldest son, his heir at law; and a second son, who died leaving a son. Upon a case, sent out of Chancery, for the opinion of the Court of King's Bench, the Judges certified, that an estate in tail male passed to the grandson, as heir male of the body of the devisor. (*c*)

44. A devise to the heirs male of the devisor only extends to the heirs male of his body, and not to a collateral heir; so that if the devisor has not an heir male of his body, the devise is void. (*d*)

45. A person devised his lands to his granddaughter, who was his heir at law, for her life; remainder to his own right heirs male, forever; and died leaving his granddaughter his heir at law, and a deceased brother's son, being the next in the male line. (*e*)

Lord Macclesfield held the devise void, because it was to the heirs male, without saying of any body.

This cause came on again before Lord Hardwicke, who directed a case to be made, for the opinion of the Judges of the Court of King's Bench, who certified that the brother's son could not take by the description of right heir male of the testator. (*f*)

(*a*) Doe *v.* Ironmonger, 3 East, 533.
(*b*) Tit. 32, c. 20.
(*c*) Wills *v.* Palmer, 5 Burr. 2615.
(*d*) Ford *v.* Ossulston, 11 Mod. 189.
(*e*) Dawes *v.* Ferrers, 2 P. Wms. 1.
(*f*) 8 Vin. Ab. 317.

46. It was held in a modern case, that a devise to the right heirs of husband and wife, was a devise to such person as answered the description of heir to both, namely, a child of both, husband and wife being considered in law as but one person. And where no preceding estate was given to the father and mother, such child should take as a purchaser. (*a*)

47. It was held, in a case in 9 Will., that a special heir, though he was not heir general, might take by purchase, under a will, if the devisor expressly exclude the heir general; but a devise in remainder to the right heirs of the testator forever, his son excepted, is void. (*b*)

169 * *48. C. Ben devised to the eldest son of his son all his estates for life; and for want of heirs in him, to the right heirs of himself, C. Ben, the testator, forever, his son excepted; it being his will he should have no part of his estates, either real or personal. C. Ben, the testator, left a son and three daughters. On a question who was entitled to this estate, the Court of King's Bench determined in favor of the daughters. A writ of error was brought in the House of Lords, where the Judges were unanimously of opinion, that no person took any estate under this will; whereupon the judgment of the Court of King's Bench was reversed. (*c*)

49. The word "*issue*" is a sufficient *designatio personæ*, or description of a devisee, in a will; and *comprises both children and grandchildren.* (*d*)[1]

(*a*) Roe *v.* Quartley, 1 Term R. 630. 1 Inst. 187 a.
(*b*) Baker *v.* Wall, 1 Ld. Raym. 185.
(*c*) Pugh *v.* Goodtitle, 3 Bro. Parl. Ca. 454. Fearne, 8th edit. App. 573.
(*d*) 1 Bro. & Bing. 484. (Kingsland *v.* Rapelye, 3 Edw. 1.)

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[1] The words "*issue*," or "*heirs of the body*," in a devise, must mean either the indefinite lineal *succession* of heirs of the body, or, the particular *individuals* who, at a given time, answer the description of "*issue.*" Ferrill *v.* Talbott, Riley, Ch. Cas. 247. And upon the context, the word "*issue*" may have two different meanings as to two moieties of a devised estate. Carter *v.* Bentall, 2 Beav. 551. And see Williams *v.* Teale, 6 Hare, 239. So, as to the word "*survivor.*" Winterton *v.* Crawford, 1 Russ. & My. 407. Generally, the words "*lawful issue*" have as extensive a signification as "*heirs of the body;*" embracing lineal descendants of every generation; and when used in the devise of an unrestricted freehold, they are deemed words of limitation, and of the same effect. Kingsland *v.* Rapelye, 3 Edw. 1. See also, Crozier *v.* Crozier, 3 Dru. & War. 373; Minter *v.* Wraith, 13 Sim. 52; Earle *v.* Hopkins, 1 Browne, App. 55.

In determining the meaning of the words "*issue*," or "*children*," the whole context

50. A devise was made to the issue of I. S., who had then a daughter living, and afterwards had a son born. The question was, who should take. Lord Cowper said, that all the children should take, and even grandchildren, if there had been any: and although the devise was to the issue begotten, that made no difference; the words "*begotten*," and "*to be begotten*," were the same, as well in the construction of wills, as settlements, and take in all the issue after begotten; and though, upon the death of the testator, there was then only a daughter born, yet, upon the birth of another child, the estate should open, and take in an after-born son. (*a*)

51. In a case which has been already stated, it was held, that a devise to the issue male of E. Armyn and his heirs forever, was a good description of the person, and a word of purchase. (*b*)

52. The words "*sons*," "*children*," "*relations*," and "*descendants*," (†) are sufficient to describe the devisees in a will; provided they can be applied with certainty to persons answering those descriptions.[1]

(*a*) Cook *v.* Cook, 2 Vern. 545.
(*b*) Luddington *v.* Kime, tit. 16, c. 1, s. 50. 1 Ld. Raym. 205.

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of the will must be taken into consideration; and where the context is doubtful, the Court will adopt such a construction as will best effect the intention of the testator, and conduce to the general benefit of the family which is the object of his bounty. Yet in the case of a gift to "all and every the respective issues of the testator's daughters, either sons or daughters," followed by the frequent use, in a subsequent part of the will, of the word "*issue*," it was held, that the meaning of this word ought not to be so extended as to comprise the issue of a deceased child of one of the testator's daughters. Farrant *v.* Nicholls, 15 Law Journ. N. S. 259, M. R.; Pruen *v.* Osborne, 11 Sim. 132.

See further, as to the word "*issue*," 2 Jarm. on Wills, ch. 40, p. 328–360, by Perkins; Slater *v.* Dangerfield, 16 Law Journ. 51. [Wynch's Trust, 28 Eng. Law & Eq. 375.]

† [For the construction of limitations to *second sons* in wills, see Trafford *v.* Ashton, 2 Vern. 660; Driver *v.* Frank, 3 Maul. & Sel. 25; 8 Taunt. 468, S. C. In a deed, Hawkins *v.* Hawkins, 9 Bing. 765. As to a second son born taking under a devise of real estate to a first son, the second being eldest for the time being, Lomax *v.* Holmden, *infra*, § 54. As to a daughter, being the eldest child, taking under a devise to younger children, see Hall *v.* Luckup, 4 Sim. 5. For the construction of the words sons, children, relations, descendants, &c., see 1 Roper's Legacies, ed. 1828, ch. 2.]

[1] Where lands are devised to a person and his "*children*," the rule is, that, if there are no children at the time of the devise, these words are to be construed as words of limitation, if necessary to give effect to the intention of the testator; and the devisee will take an estate tail; but if there be children living, and capable to take, at the time of the devise, the words will be construed words of purchase, and the children will take

*170 *53. Lands were devised to the first son of A, who was not heir at law to A his father. This was held a good description of the second son. (*a*)

(*a*) Marwood *v.* Darrel, Cases Temp. Hardw. 91.

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as immediate devisees. See Wylde's case, 6 Rep. 16; Allen *v.* Hoyt, 5 Met. 324, 328; In re Saunders, 4 Paige, 293; Tayloe *v.* Gould, 10 Barb. 388; [Van Zant *v.* Morris, 25 Ala. 285.] And where the devise is general, of the residue of his estate, to children as a class, children in existence at the death of the testator are alone entitled; and among these, posthumous children are to be included. In re Gross, 6 Am. Law Journ. 324, N. S; Hodges *v.* Isaac, Ambl. 348; Horsely *v.* Chaloner, 2 Vez. 83; Heathe *v.* Heathe, 2 Atk. 121; Davidson *v.* Dallas, 14 Ves. 576. And see Congreve *v.* Congreve, 1 Bro. Ch. R. 530, Perkins's ed.

But where there is a limitation in remainder, to "*children*," as a class, it will vest in the first who comes *in esse*, and will open and let in each successive member of the class, until the determination of the particular estate. Doe *v.* Perryn, 3 T. R. 484; Right *v.* Creber, 5 B. & C. 866; Ayton *v.* Ayton, 1 Cox, 327; 1 Bro. Ch. R. 542, n.; Baldwin *v.* Karver, Cowp. 309; 2 Doug. 503.

If the context of the will, or the special circumstances, do not require a different interpretation, the words "*relations*," and "*family*," will be understood to mean "*next of kin*." Grant *v.* Lyman, 4 Russ. 292. So, by "*personal representatives*," will be understood "*executors and administrators*." Saberton *v.* Skeels, 1 Russ. & Myl. 587; Smith *v.* Barneby, 10 Jur. 748. But if the context require it, "*representatives*" will be interpreted to mean "*descendants*." Styth *v.* Monro, 6 Sim. 49.

[A testator devised certain lands after the termination of a life-estate therein, to his "then heirs at law or their legal representatives, to them, their heirs and assigns forever." Held, that the words "their legal representatives" were descriptive of the devisees and were not a limitation." Stook's Appeal, 20 Penn. (8 Harris,) 349.]

The word "*children*," in its ordinary sense, does not include grandchildren; but it may include them,—1, where it appears that there were no persons who would answer the description of children, in the primary sense of the term;—or, 2, where there could not be such at the time, or in the event, contemplated by the testator;—or, 3, where the testator has clearly shown, by the use of other words, that he used this word as synonymous with "*issue*," or "descendants." Mowatt *v.* Carow, 7 Paige, 328. And see Ruff *v.* Rutherford, 1 Bail. Eq. R. 7; Reeves *v.* Brymer, 4 Ves. 692; Peel *v.* Catlam, 9 Sim. 372; Dickinson *v.* Lee, 4 Watts, 82; Hallowell *v.* Phipps, 2 Whart. 376; [Hughes *v.* Hughes, 12 B. Mon. 115.]

Where one devised lands to his son, and if he should continue unmarried till his death, remainder to all the testator's *surviving children*; it was held, that by these words, the remainder was to such as should survive the first devisee. Den *v.* Sayre, 2 Penn. 598; [Martin *v.* Kirby, 11 Gratt. (Va.) 1; Schoppert *v.* Gillam, 6 Rich. Eq. (S. C.) 83.] If the testator has children of his own, and also step-children, a devise to "*his children*," does not include the step-children; and parol evidence will not be admitted to show that the testator intended to include them. Fouke *v.* Kemp, 5 H. & J. 135.

Where one devised lands to his wife and three children; and if she should be *enciente* at his death, then to her and his four children; and while he lived she had a fourth child, and was *enciente* with the fifth at his decease; it was held that all the five children were equally entitled. Adams *v.* Logan, 6 Monr. 175. And see Trower *v.* Butts, 1 Sim. & Stu. 181; Lenden *v.* Blackmore, 10 Sim. 626; Mogg *v.* Mogg, 1 Mer. 655; Harris *v.* Lloyd, Turn. & Russ. 310.

54. A person devised to his son Caleb, for life, and after his decease to the first, second, third, &c. sons of his body begotten. Caleb had married about two months before the date of the will; he had a son who died soon, and afterwards had another son. (*a*)

Lord Hardwicke decreed, that the second son should take under the will, as first son, for these words were not to be always taken strictly in the sense of *primogenitus*, or first-born, but in the sense of an elder son, senior, or *maximus natus*.

55. It has been stated, that in deeds, as the word *procreatis* extends to issue born after the execution of the deed, so the word *procreandis* will extend to issue born before. This mode of construction is of course extended to wills, in which the words "*to be begotten*," and "*begotten*," have the same sense; and in the preceding case, Lord Hardwicke held that doctrine, which has been confirmed in a modern case. (*b*)

56. A person devised her real estate to trustees, in trust for her daughter Martha, with a proviso, that if she died before twenty-one, or marriage, then in trust to convey all the residue of her estate, both real and personal, "*unto her nearest relation of the name of Pyot;*" and to his or her heirs, executors, administrators, and assigns. The daughter died under age and unmarried. (*c*)

At the time of the will, and death of the testatrix, her nearest relations of the name of Pyot, were the plaintiff, Charles Pyot, and his sisters, the defendants, Ann and Blanche, who were both then unmarried, but were married at the time of Martha's death.

(*a*) Lomax *v.* Holmden, 1 Vez. 290.
(*b*) Tit. 32, c. 22. Doe *v.* Hallett, 1 Maule & Selw. 124.
(*c*) Pyot *v.* Pyot, MS. Rep. 1 Vez. 335.

Where lands were devised to all "*the younger children*" of the testator's daughter, with a devise over *in case she should leave no issue behind her;* and the daughter had a husband and children who survived the testator, and afterwards had a second husband and other children; it was held, that the children of the second marriage took equally with those of the first. Critchett *v.* Taynton, 1 Russ. & My. 541.

See further, as to devises to "*child*," "*children*," "*son*," or "*daughter*," and where these are words of limitation, 2 Jarm. on Wills, ch. 39, p. 307–327, by Perkins; Snowball *v.* Procter, 2 Y. & C. 478; Jackson *v.* Merrill, 6 Johns. 185.

"*Eldest son*," held, under the circumstances, not to include a second son who became the eldest by the decease of his elder brother. Livesay *v.* Livesay, 13 Sim. 33.

They had besides these another sister, Caroline, who had been married many years before the testatrix's death, and was no party to the suit. The plaintiff had also had an elder brother, John, who died before the testatrix, but left issue a son, Richard Pyot, who survived both the testatrix and her daughter, and was heir at law on the part of the mother to the testatrix; and to whom the trustees, after the daughter's death, conveyed the estate in question. This Richard Pyot devised the premises to trustees in trust for the defendant, Pyarea Pyot, his wife, and E. Wilmot. The plaintiff, by his bill, claimed the testa-
171* trix's estate, as the *nearest relation of the name of Pyot. The defendants Ann and Blanche, the plaintiff's sisters, insisted that they were entitled equally with the plaintiff, as they were both unmarried, and of the name of Pyot, at the time of the will, and death of the testatrix. And the defendant, Pyarea Pyot, and E. Wilmot, who stood in the place of Richard Pyot, the heir at law, insisted that either he was the person meant by the nearest relation, or else that the devise was void for uncertainty; and so the premises descended to him, as heir to the testatrix on the part of her mother.

Lord Hardwicke said, the first question was, whether the devise was absolutely uncertain, and he thought it was not. It was said, that by the words *nearest relation*, the testatrix meant some single person; but he was of opinion that the word *relation* here was to be taken as *nomen collectivum*, as much as kindred or heir. Suppose the devise had been to her nearest kindred, no doubt that it would have taken in several persons; wills and acts of parliament, Lord Coke tells us, were to be taken according to common parlance, and the word "*relation*," was often used instead of "*kindred*," it being common to say, such an one has a numerous relation, whereby were meant many; and it was good English. But the present case differed from all that had been cited, because the personal estate was involved in the same devise with the real, and had this been a bequest only of personal estate, all those who were of the name of the Pyots in an equal degree, and were of the nearest stock to the testatrix, would have taken, by virtue of the Statute of Distributions; and if it was clear who should take the personal estate, it naturally inferred whom the testatrix meant should take the real,

there being but one intent as to both; and this of the personal was a proper key to explain how the real estate was intended to go.

The next question was, who was to take? At the time of making the will, there were three persons in equal degree of the name of Pyot, and a fourth who had been so, but was married: two of the three married before the happening of the contingency, upon which they were to take, and so lost their name; whence it was insisted by the plaintiff, that these, not being of the name when the contingency happened, could not claim with him, but he alone was entitled; and for this was cited Jobson's case, Cro. Eliz. 57. He was not well satisfied with that determination; for what was meant was a description of the *person, without any regard to the continu- *172
ation of the name; and had the daughter been unmarried at the devisor's death, she would immediately have taken, nor could her subsequent marriage make her lose her right; it being immaterial, if she was to change her name, at what time she did it. But that case differed from the present, being a remainder to the next of his kin, of his name, after an estate tail to A. Taking, therefore, the word "*relation*" to be *nomen collectivum*, there was no ground to construe this description to refer to the very name of Pyot, but rather to be a description of the stock, and as if she had said the stock or blood of the Pyots. For taking it otherwise, and suppose some nearer relation of the testatrix, but of another name at her death, had afterwards changed by act of Parliament his former name to Pyot; or if a woman had married some man of the name of Pyot, but no way related to the testatrix, such a one would certainly not be entitled to take; and yet every argument drawn from the bearing the name of Pyot, at the happening of the contingency, would hold equally strong for him or her, as it did for the plaintiff's taking alone, in exclusion of his sisters. This showed it, therefore, to be too narrow a construction, and that the word "*relation*" and "*name*" meant the stock of the Pyots, which she meant to distinguish from any other stock of consanguinity to her. It was like a devise upon condition to marry a person of the devisor's name; the devisee married a man who had changed his name to that of the devisor: held, this was no performance

of the condition, for that "*name*" meant "*family.*" The personal estate was coupled with the real, and one rule must govern both, and the sister that was married was, he thought, equally entitled to take with the plaintiff and the other two sisters. The testatrix had made no provision that the persons taking should continue to bear the name; and therefore the plaintiff and his three sisters should take equally. (*a*) [1]

57. A testator devised his estate to three persons for life, and after their death, "*to the descendants*" of Francis Ince, then living in and about Seven Oaks in Kent. (*b*)

Sir T. Clarke, M. R., said, that a devise to descendants at large had been good; here the devisor added a description of such as he intended should take, which was sufficiently precise and certain; it would be unjust to confine it to the heirs at law, because the word "*descendants*" meant all those who pro-
173 * ceeded * from his body, and therefore the grandchildren of Francis Ince were entitled; but a great grandchild, being born after the will was made, was excluded by the words, *then living.*

58. Lord Leigh devised his estates to his sister Mary Leigh, in strict settlement; remainder "unto the first and nearest of his kindred, being male, and of his name and blood, that should be living at the determination of the several estates therein-before devised, and to the heirs of his body lawfully begotten." (*c*)

It was held by Lord Eldon, in conformity to the opinions of Mr. Justice Lawrence and Mr. Baron Thompson, whom he had called to his assistance, that a person, claiming under this limitation, must be of the name, as well as the blood; and that the qualification as to the name was not satisfied, by having the name, taken by the king's license, previous to the determination of the preceding estates. (*d*)

59. A person devised all his freehold estates to his wife during

(*a*) Bon *v.* Smith, Cro. Eliz. 532. Marsh *v.* Marsh, 1 Bro. C. C. 293.
(*b*) Crossly *v.* Clare, Amb. 397.
(*c*) Leigh *v.* Leigh, 15 Ves. 92. Pearce *v.* Vincent, 1 Crom. & Mee. 598.
(*d*) Denn *v.* Bagshaw, 6 Term Rep. 512. Doe *v.* Plumptre, 3 Bar. & Ald. 474.

[1] A., having during the lifetime of his wife M., intermarried with C., died, leaving both M. and C. living. By his will, made after his marriage with C., he devised lands to his "dear wife C.;" and it was held a good devise to C. Doe *v.* Roast, 12 Jur. 99.

her natural life; and at her decease to be equally divided amongst the "*relations on his side.*" It was held, that all those should take who would be entitled to personal estate under the Statute of Distributions, that is, first cousins; as well in the paternal as in the maternal line. And the devise spoke at the time of the testator's death, not at the time of framing the devise; therefore, one who was related in equal degree, at the time of making the will, having died before the testator, leaving a son, the son was held not entitled to a share, as a relation. (*a*) † [1]

60. It was held in Queen Elizabeth's time, that a devise to one brother, on a condition, and on failure to remain to the "*house*," *should be construed to mean to the most worthy in blood of the devisor's family, that is to say, *to the heir at law.* Lord Hobart has assented to this decision, and it has been confirmed in two modern cases, one of which has been already stated. (*b*) ‡ [2] *174

(*a*) Doe *v.* Over, 1 Taunt. 263. (Green *v.* Howard, 1 Bro. Ch. C. 33. Holloway *v.* Holloway, 5 Ves. 399. Bird *v.* Wood, 2 Sim. & Stu. 400. Doe *v.* Lawson, 3 East, 278.) 17 Ves. 255.

(*b*) [On the construction of the word *family*, in bequests of personal estate, see 1 Rop. Leg. c. 2, s. 10, p. 123, ed. 1828, and see Doe *v.* Wood, 1 B. & Ald. 518.] Chapman's case, 3 Dyer, 333 b. Hob. Rep. 29. (Wright *v.* Atkyns, Turn. & Russ. 156.)

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[1] As to "*nearest of kin*," see Urquhart *v.* Urquhart, 13 Sim. 613; Grafftey *v.* Humpage, 1 Beav. 52; Cotton *v.* Cotton, 2 Beav. 67.

The words, "*nephews and nieces*," held to include their children. James *v.* Smith, 14 Sim. 214.

"*Relations*" held to extend to first cousins. Craik *v.* Lamb, 1 Coll. N. C. 489; 9 Jur. 6. And to wife's mother. McNeilledge *v.* Galbraith, 8 S. & R. 43.

"*Cousins*," restricted to first cousins and their children. Caldecott *v.* Harrison, 9 Sim. 457. And see Slade *v.* Fooks, Ibid. 386.

[† There is a reference in the above case, (1 Taunt. 266,) and also in 19 Ves. 301, to a case in 1732, decided by Sir Joseph Jekyll, in which it is stated to have been held, that, under a limitation to the family of J. S., the real estate went to the heir at law, and the personal estate to the next of kin.—Search was made for this case, on the discussion of the late case of Wright *v.* Atkyns.—The case is Golding *v.* Rogers, and was decided at the Rolls on the 3d July, 1732. Samuel Fitzall devised all his messuages, &c. in the county of Gloucester and elsewhere, in Great Britain, to his wife, her heirs and assigns, and all the residue of his moneys, &c., and all other his real and personal estate, he devised and bequeathed to his said wife, her heirs, executors, &c. But his will was, that after his said wife's decease, his own family should have equally amongst them one moiety of his said residuary estate. Held, that one moiety of the residuary personal estate belonged to his next of kin, and that the wife was entitled, by the express words of the will, to the real estate in fee simple.—*Note to former edition.*]

[‡ Wright *v.* Atkyns, *ante*, § 17; Doe *v.* Smith, 5 Mau. & Sel. 126.]

[2] The word "*family*" admits a variety of applications; and the interpretation of it,

61. With respect to the *words that are necessary to describe the property intended to be devised;* as a will is always construed in the most favorable manner, for the benefit of the devisees, the same accuracy is not required in the description of those things which are intended to be devised, as is necessary in a deed; it being enough if the words denote, with sufficient certainty, what is meant to be given.[1]

62. The words "*lands, tenements, and hereditaments,*" will pass every species of property. And in a modern case, it was determined, that money, directed to be laid out in the purchase of lands, would pass by the words "*lands, tenements, and hereditaments whatsoever and wheresoever.*" (*a*)[2]

63. The words "*all my lands,* are sufficient to pass a house. If, however, it appears not to have been the intention of a testator to give a house by those words, they will not have that effect. (*b*)

64. A person, being seised of a house in Dale, and of three

(*a*) Rashleigh *v.* Master, 3 Bro. C. C. 99. (Parker *v.* Marchant, 5 M. & G. 498. 6 Scott, 485, N. R.) (*b*) Cro. Eliz. 477.

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in a particular will, must depend on the intentions of the testator, to be collected from the whole context. Blackwell *v.* Bull, 1 Keen, 176.

As to devises to "*family,*" "*descendants,*" "*issue,*" "*next of kin,*" "*relations,*" "*personal representatives,*" &c., see 2 Jarm. on Wills, ch. 30, p. 25–68, by Perkins; 2 Story, Eq. Jur. § 1065 b, 1071, 1072, and cases there cited. White *v.* Briggs, 9 Jur. 678; 2 Phil. 583; Beals *v.* Crisford, 13 Sim. 592. [The words "*male line,*" where one died without issue, were held equivalent to *ex parte paternâ.* Boys *v.* Bradley, 17 Eng. Law & Eq. 132; Gaudry *v.* Pinniger, 11 Ib. 63; Peterson *v.* Webb, 4 Ired. Eq. 56.]

[1] As to the words necessary to describe the property devised, and what passes by them, see *ante,* tit. 32, ch. 21, § 31–62.

A devise of "half a mile of the beach, to be measured at high-water mark, for drift-wood and timber," the testator owning the upland, was held to pass the soil as far up as that line of the shore to which sea-weed and drift-wood are usually carried by the sea, by the highest ordinary winter floods, but not by extraordinary inundations. Brown *v.* Lakeman, 17 Pick. 444. [A devised to his son B, all my homestead farm in said D., being the same farm whereon I now live, and the same that was devised me by my honored father." *Held,* that the last clause was only a description of the homestead farm, and that such a devise would pass all the homestead farm though it appeared that part of it was not devised to the testator by his father. Drew *v.* Drew, 8 Foster, (N. H.) 489. A devise of "all lots of land lying southerly of B. street, and westerly of P. street, except lot No. 17," the lot No. 17 being southerly of B. street, but easterly of P. street, is not limited to such lots as lie both southerly of B. street, and westerly of P. street. Hall *v.* Hall, 7 Ib. 275; see also, Holton *v.* White, 3 Zabr. 330.]

[2] The word "*tenements,*" in a will, has never been construed, without other circumstances, to pass a fee. Wright *v.* Den, 10 Wheat. 234.

houses and certain lands in Sale, devised his house in Dale and all his lands in Sale to B. It was resolved, that the houses in Sale did not pass, on account of the express mention of the house in Dale; for, *expressum facit cessare tacitum:* and if the testator had intended to devise the houses in Sale, he would have mentioned them, as well as he did the house in Dale. (*a*)

65. One Bishop, being seised of divers lands called Hayes Lands, which extended into two vills, Cokefield and Cranfield, devised all his lands in Cokefield, called Hayes Lands, to his youngest son and his heirs; and in another part of his will he devised, that if his youngest son died without issue, his wife should have Hayes Lands. (*b*)

The question was, whether the wife should have Hayes Lands in Cranfield, or only in Cokefield. And it was resolved by the whole Court, that she should have that only which was in Cokefield, because there was no more devised to the youngest son. But Popham said, if the devise had been to the eldest son, and that if he died without issue, his wife should have Hayes * Lands, there peradventure she should have all; *175 because the eldest son had all, the one part by devise, the other by descent; and she should have all which he had. (*c*)

66. A devise of a "*messuage*" will carry with it the curtilage and garden annexed to such messuage, even without the word "*appurtenances;*" for they constitute a part of the messuage. It was formerly held, that the word "*house*" did not, in a will, carry the garden or curtilage belonging to such house, without the word "*appurtenances.*" But this doctrine is now somewhat altered. (*d*)

67. A being tenant for years of a house, garden, stables, and coal-pen, occupied by him, devised in the following words:—"I give the house I live in, and garden, to B." It was resolved, that the stables and coal-pen passed, they not being specifically given in the subsequent part of the will; though the testator used them for the purpose of trade, as well as for the convenience of his house. (*e*)

68. In a subsequent case, it was determined by the Court of

(*a*) Ewer *v.* Hayden, Cro. Eliz. 476. (*b*) Woodden *v.* Osbourn, Cro. Eliz. 674.
(*c*) See also Doe *v.* Bower, 3 Bar. & Adol. 453.
(*d*) Carden *v.* Tuck, Cro. Eliz. 89. 2 Cha. Ca. 27.
(*e*) Doe *v.* Collins, 2 Term R. 498. Goodright *v.* Pears, 11 East, 58.

Common Pleas, that lands, usually occupied with a house, did not pass under a devise of *a messuage with the appurtenances;* it not appearing that the testator meant to extend the word "*appurtenances*" beyond its technical sense. (*a*) [1]

69. The word "*estate*" will pass every kind of property of a real nature, unless restrained by other words. (*b*) [2]

(*a*) Buck *v.* Nurton, 1 Bos. & Pull. 53. Doe *v.* Roberts, 5 Bar. & Ald. 407.

(*b*) (Tarbell *v.* Tarbell, 3 Yeates, 187. Blewer *v.* Brightman, 4 M'Cord, 60. Archer *v.* Deneale, 1 Pet. 585.)

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[1] But lands may pass, under the term "*appurtenances,*" in a will, if such appears to have been the intent. Otis *v.* Smith, 9 Pick. 293; Eliot *v.* Carter, 12 Pick. 436; Leonard *v.* White, 7 Mass. 6.

[2] The word "*estate,*" in a will, does not necessarily include real property, but its meaning must be taken as explained by the context. Thus, where, after a devise of real estates, the testator proceeded thus: — "I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, *estate,* and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death," to certain executors in trust; it was held that the word *estate* did not pass the real estate. Sanderson *v.* Dobson, 1 Exch. R. 141; 16 Law J. 249, Ex. The general rule is, that in the *operative* part of the will, the word "*estate*" passes not only the *corpus* of the property, but all the testator's interest in it, unless controlled by the context; but where the word occurs not in the operative clause of the devise, but in another part of the will referring to it, this word cannot extend the meaning of the operative clause, whether prior or subsequent. Doe *v.* White, 1 Exch. R. 526; 17 Law J. 327, Ex.

A devise of "*all my land and estate,*" followed by a particular description of the tracts devised, has been held, *not* to comprehend another tract *not* enumerated; but to go to the heir at law, by descent, though he was cut off in the will by the gift of a shilling. Myers *v.* Myers, 2 M'Cord, Ch. R. 264. The words "*worldly estate,*" have been held to pass both real and personal estate. Muddle *v.* Fry, 6 Madd. 270. So, the words "*all my goods, chattels, estate and estates whatsoever.*" Churchill *v.* Dibben, 9 Sim. 447. And the word "*property.*" Den *v.* Payne, 5 Hayw. 104. So, by a gift to his wife, for her life, of "*all his money, goods, chattels, estates, and effects, of what nature or kind soever, and wheresoever found,*" and at her decease "*all his property, of goods, money, chattels, estate, or effects whatsoever,*" to be divided among his children; it was held that the testator's real estate passed. Midland Co. Railw. Co. *v.* Oswin, 1 Coll. 74; 8 Jur. 138.

See further, as to the force of the words "*estate,*" "*property,*" &c. 2 Jarm. on Wills, ch. 34, p. [181]–[189], Perkins's ed.; Doe *v.* Lawton, 4 Bing. N. C. 455; Sutton *v.* Wood, Cam. & Nor. 202; *Infra,* ch. 11, § 25–39; Rosseter *v.* Simmons, 6 S. & R. 452; Jackson *v.* Housel, 17 Johns. 281; Harrold *v.* Hoskins, 2 Dev. & Bat. 479. [The word estate, in a will, applied to real property, may either express the quantity of interest devised, or designate the thing devised, or both; and the sense in which it is used must be determined from the will. Hart *v.* White, 26 Vt. (3 Deane,) 260; Schriver *v.* Meyer, 19 Penn. (7 Harris,) 87; Foster *v.* Stewart, 18 Ib. 23; Mayo *v.* Bland, 4 Md. Ch. Decis. 484; Wheeler *v.* Dunlap, 13 B. Mon. 291; Jessup *v.* Jessup, 1 Busbee, Eq. (N. C.) 179.]

70. The Earl of B. by his will, gave part of his personal estate to his son-in-law, and then added these words:—"*And all other my estate, real and personal.*" The question was, whether fee-farm rents passed by this devise. (*a*)

Lord Holt delivered the opinion of the Court, that the rents passed by the words, "all my real and personal estate;" for the word estate was *genus generalissimum*, and included all things real and personal. (*b*)

71. But where a person gave £4,000 to trustees, in trust for certain persons, and by a residuary clause gave all the rest of his estate and effects, of what nature soever, to A and B, their executors and administrators, in trust to add the interest to the principal, so as to accumulate the same; it being his will that the residue should not pass, but at the time and manner as the principal sum of £4,000 was directed to be paid. It was held that these words did not extend to a freehold house, of which the testator was seised. And Lord Kenyon relied on the following words of the clause, "to add the interest to the principal, *so as to accumulate the same." The interest and *176 principal were to make one consolidated sum of the same nature; but these were terms wholly inapplicable to a real estate. (*c*)

72. The words "*all my rents*," are sufficient to pass real estates; for it is according to the common phrase, and usual manner of some men, who name their lands by their rents.[1]

73. A person, having let several houses and lands for years, rendering several rents, made his will in these words:—"As concerning the disposition of all my lands and tenements, I bequeath

(*a*) Bridgwater *v.* Bolton, 1 Salk. 236. (*b*) Barnes *v.* Patch, 8 Ves. 604.
(*c*) Doe *v.* Buckner, 6 Term R. 610.

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[1] A devise of "*the privilege of cutting firewood*" on a particular lot, is a devise of an interest in the land itself. Wright *v.* Barrett, 13 Pick. 41. A devise of "*the rents, profits, and income*" of lands, is sufficient to pass the land itself. Anderson *v.* Greble, 1 Ashm. 136. And see Den *v.* Drew, 2 Green, 68; Reed *v.* Reed, 9 Mass. 372.

[A devise that a person "shall receive for his support one-third of the net profits of a farm," is a devise of the land itself. Earl *v.* Rowe, 35 Maine, (5 Red.) 414. See Boyle *v.* Parker, 3 Md. Ch. Decis. 42; Parker *v.* Wasley, 9 Gratt. (Va.) 477; Cassily *v.* Meyer, 4 Md. 1; Pippin *v.* Ellison, 12 Ired. 61. A gift of the dividends forever, held a gift of the stock. Tyrrell *v.* Clark, 23 Eng. Law & Eq. 536.]

the rents of D. to my wife for life, remainder over in tail." The question was, whether, by this devise, the reversions passed with the rents of the lands. For it was contended that the rents, divided from the reversions, were not devisable within the statute, the devisor having no reversion therein. (*a*)

The Court resolved, that the land itself passed by the devise; for it appeared to be the intention of the testator to make a devise of all his lands and tenements, and that he intended to pass such an estate as should have continuance for a longer time than the leases should endure; and the words were apt enough to convey it, according to the common phrase and usual manner of some men, who name their land by their rents. (*b*)

74. The words, "*all I am worth*," without any other words to control them, will pass real as well as personal estate.[1]

75. A testator, having given all the overplus of his money to the son and daughter of I. S., proceeded in these words:—"I give and bequeath to them all I am worth, except £20, which I give to my executor." It was contended, that there being no expression in the will which pointed at the real estate, the personalty could only pass. But it was decreed, that these words carried both the real and personal estate. (*c*)

76. The word "*legacy*" may be applied to a real estate, if the contents of the will show that such was the testator's intention.

77. A, by will, gave two legacies, of £150 each, to his son and daughter, to be paid when they attained the age of twenty-one. He then gave all his realty and personalty to his wife for life, and, after her death, he gave one freehold estate to the son, and another to the daughter; but if either or both of the children should die before the wife, then those *legacies* which were left to them should return to the wife. (*d*)

177* *Lord Kenyon said, the question was, whether those words of remainder operated on the real estates before

(*a*) Kerry *v.* Derrick, Cro. Jac. 104. 1 Atk. 506. 1 Vez. 42, 171.
(*b*) 2 Ves. & B. 74. Stewart *v.* Garnett, 3 Sim. 398.
(*c*) Huxstep *v.* Brooman, 1 Bro. C. C. 437. Cowp. 306.
(*d*) Hardacre *v.* Nash, 5 T. R. 716.

[1] A devise of "*all that I possess, in doors and out doors*," is sufficient to pass real estate. Tolar *v.* Tolar, 3 Hawks, 74. And see Dewey *v.* Morgan, 18 Pick. 295; Pitman *v.* Stevens, 15 East, 505; Thomas *v.* Phelps, 4 Russ. 348.

given to the son and daughter, or only referred to the pecuniary legacies? The Court had considered the whole of the will, and was of opinion, that those words acted upon the real estates before given to the son and daughter. Considerable stress had been laid on the word "*legacies*," and it was argued, that it was an appropriate term, applicable to personal estate only. But the same technical and correct expressions were not to be expected from unlettered persons, as were usually found in wills drawn by professional men. Even if there were no decision to warrant the Court in saying that the word "*legacy*" might be applied to a real estate, if the context required it, he should have had no difficulty in making such a determination for the first time. But that construction had already been put on the word "*legacy*" in the case of Hope *v.* Taylor; and the Court fully subscribed to the doctrine there laid down. (*a*)

78. [So real property will pass under the description of "*personal*," if it is manifest that such was the testator's intention.

79. Thus where the testator gave his stock, cattle, household goods, money, &c., and personal estates, whatsoever and wheresoever to his wife for life; but if she were to marry, she was to receive no profits from his estates whatsoever; but to resign all his personal estates to the after-named legatees, "in manner following:—I give to my brother, J. T., the house and premises I now dwell in, with the close adjoining, &c., to hold to him, his heirs and assigns:" the remainder of his personal estates the testator gave to another brother and two sisters, share and share alike, to hold to them, their heirs and assigns forever. The testator subsequently declared, that if his wife did not marry, she should possess all his abovementioned estates for her life; and at her death he gave "his personal estate as abovementioned, that is, his house and premises wherein he then dwelt, to his brother, J. T., his heirs and assigns." Lord Ellenborough held, that the freehold property passed. (*b*)

80. In King *v.* Shrives, the testator, being seised of a freehold farm in Bedfordshire, in his own occupation, gave and bequeathed to his brothers, James and John King, all his goods, chattels, estate and effects of what nature, sort, kind, quantity or quality soever, and wheresoever, (*not thereby otherwise*

(*a*) *Infra*, c. 12.

(*b*) Doe *v.* Tofield, 11 East, 246.

* 178 *disposed * of,*) upon trust, *first*, that his debts, &c., should be fully paid, and that whatsoever remained *after such discharge of his personal effects*, should be appropriated for the benefit of his family then residing with him. *Secondly*, he willed and appointed, that his family, then residing with him as aforesaid, should be placed on the farm, his own estate, and then occupied by him, to occupy and manage it for their mutual advantage, until his youngest son should attain twenty-one years; nevertheless, under the direction of his executors who should have power to interfere, in case any difference or misunderstanding should arise between them, as mentioned in the will. *Thirdly*, when his youngest son should attain twenty-one, he directed his estate to be sold, and the produce divided in certain shares among his wife and children, and he appointed James and John King his executors. The testator died seised of the said estate in Bedfordshire, and another freehold estate, which latter estate was subject to a mortgage debt, with an arrear of interest. The testator was indebted to various simple contract creditors, and left no personal estate to satisfy the mortgage and other debts. The trustees entered into a contract with Shrives for sale of the freehold estate in mortgage, for the purpose of paying the debts; and on a case, sent by the Vice-Chancellor, the question was whether they had, under the will, power to sell the estate for payment of the debts, and to convey to the purchaser. It was contended, that the word "*estate*," in the first bequest in the will, meant only *personal estate;* a construction strengthened by the testator directing that what should remain of *his personal estate* after discharge of his debts, should be appropriated for the benefit of his family. On the other hand it was insisted, that the freehold estate in question passed, under the devise of the testator's *estate*, that word being sufficient, if not controlled by indications of a contrary intention, which could not be found, as the testator's first wish was that his debts should be discharged. The certificate of the Court of C. B. expressed their opinion, that, under the will, the trustees were entitled to sell and convey the freehold estate in question, for the payment of the testator's debts.] (*a*)

81. The words, "*all the residue or remainder of my estate, property, or effects*," will pass real estates of every kind.

(*a*) 10 Bing. 238.

82. A person devised *all the rest and residue of his estate*, whatsoever and wheresoever, to his wife. It was contended, that * the word "*estate*" did not necessarily mean *179 real estate; but Lord Mansfield answered, that the word "*estate*" carried every thing, unless tied down by particular expressions. (*a*)

83. A person devised *all the rest and residue of her estate*, of what nature or kind soever. It was contended, that these words only applied to the personal property of the testator, because they were accompanied with limitations peculiar to personal property. But the Court said, they could not restrain the meaning of those words to personal property, and negative the operation of them as to real estates. (*b*)

84. G. Jackson, being seised of several real estates, descendible freeholds, and chattels real, gave to his mother, Mary Jackson, some particular estates for life, without liberty of committing waste; he afterwards gave several legacies, and an annuity of £30 to his heir at law, and then proceeded thus:—"I also give and bequeath unto my dearly beloved mother, Mary Jackson, all the remainder and residue of all the effects, both real and personal, which I shall die possessed of. (*c*)

The question was, whether this last clause passed all the testator's freehold estates to his mother, in fee simple.

The Court of King's Bench in Ireland gave judgment in favor of the heir at law. This was reversed by the Court of King's Bench in England; upon which a writ of error was brought in the House of Lords. (*d*)

It was contended, on behalf of the appellant, to be an established rule, that an heir at law should not be disinherited but by express words, or necessary implication. The residuary clause in this case contained no express devise of the real estates; the word "*effects*" being properly applicable only to personal estate. The subsequent words, "*which I shall die possessed of*," supported and strengthened this construction; because the express allusion of those words to a future acquisition was inapplicable to real estates, as none acquired after the publication of the will

(*a*) Roe *v.* Harvey, 5 Burr. 2638.
(*b*) Doe *v.* Chapman, 1 H. Bl. 223. See Newland *v.* Marjoribanks, 5 Taunt. 268.
(*c*) Hogan *v.* Jackson, Cowp. 299. (*d*) 3 Bro. Parl. Ca. 388.

could pass by it; and the word "*possessed*" properly related only to personal estate; as to the word "*real*," annexed to the word "*effects*," it applied expressly to the chattels real left by the testator; nor was there any necessary implication, that any greater interest in the real estates was intended for the mother, than the estate for life, without power of waste, expressly devised to her in two of the denominations. Such an implication, so far
180* from being necessary, *was incompatible with, and would merge and destroy, and in fact revoke, the mother's express estate for life, and restriction from waste; and would break through another rule, as well of law as of common sense, which says, that what is expressed shall not be destroyed by implication.

Another rule of construction was, that where words, used by a testator, are indifferently applied to real and personal estates, they should not, if there was any thing to satisfy them, receive a construction prejudicial to the heir. Now in the present case, the words "*bequeath*," "*effects*," and "*possessed of*," were indisputably much less applicable to real than to personal estate; they had never been admitted to apply to the former, except where insurmountable arguments of such an intent, afforded by other parts of the will, rendered that construction necessary. But here the other parts of the will were so far from requiring such a construction, that they were destroyed if it were admitted. The words, in their most proper sense, applied to personal estate; and the chattels real which the testator left, showed his reason for annexing the word "*real*" to "*effects*," which otherwise properly meant movables only, and fully satisfied those words; they could not therefore be extended to real estates.

It was also an established rule, that general words, in one part of a will, should be so construed as not to defeat the plain intention of the testator, to be collected from any other part of his will. Now, in the present case, the devise to the mother for life, without power of waste, was incompatible with an intention to give her the same lands in fee; and therefore the residuary clause must be so construed as to avoid this inconsistency.

On the other side it was contended, that it was manifest the testator did not mean to die intestate, as to any part of his real property; not only from the expressive words in the residuary

clause, but also from the introductory words of the will, "*as to my worldly substance;*" which had been always understood to consist of real and personal estate; and to indicate an intent, in the testator who used them, to dispose of all his property. The testator's first devise to his mother was only of a part of his real estate; creditors were entitled to a further part, that is, so much as would be sufficient, by sale, to discharge their incumbrances; the legatees were entitled to a further part thereof; yet there still remained some part to dispose of; and this remainder the *testator had, with perfect consistency, given to his *181 mother, by the residuary clause. The views, with which he made these two devises, were sufficiently obvious; by the former, in all events, and subject to no incumbrance, he made a provision for his mother; by the latter, he gave her the residue which might remain, after all the incumbrances should be discharged. He had not, therefore, given *part* and the *whole* to his mother.

In this case, the heir at law was disinherited, both by express words, and by necessary implication; for, in the residuary clause, the testator had made use of the most expressive and comprehensive words, in giving to his mother the whole remainder of his real property. (*a*)

The Judges having been consulted, the Lord Chief Baron delivered their unanimous opinion, that Mary Jackson took an estate in fee in all the testator's property, under the residuary clause: and the judgment of the Court of King's Bench in England was affirmed. (*b*) [1]

85. [The construction, in respect of general words in the residuary clause is, that they will carry every estate or interest which is not expressly, or by necessary implication, excluded from their operation; and no intention of the testator, to exclude a reversion, is necessarily to be implied from the circumstance, that one of several charges on the residuary estates could not attach upon such reversion.] (*c*)

(*a*) Doe *v.* Dring, 2 M. & Sel. 448.

(*b*) Doe *v.* Lainchbury, 11 East, 290. Den *v.* Trout, 15 East, 394. Morgan *v.* Surman, 4 Taunt. 289.

(*c*) Doe *v.* Weatherby, 11 East, 322. Goodtitle *v.* Mar. of Downshire, 2 Bos. & P. 600. *Infra*, William *v.* Thomas, 12 East, 141.

[1] [See also Forsaith *v.* Clark, 1 Foster, (N. H.) 409.]

86. But where the words, "*residue of my estate, property, or effects,*" appear, from the context of the will, to have been confined by the testator to personal property only, they will not be construed to extend to real estates.

87. A man, having settled all his estate of inheritance on his wife for life, for her jointure, made his will, and thereby devised several pecuniary legacies; and then said,—"All the rest and residue of my estate, chattels, real and personal, I give and devise to my wife." The question was, whether the reversion of the jointure lands passed to the wife. Lord Harcourt decreed it did not; because the precedent and subsequent words explained his intent to carry only his personal estate; for in the first part of the will, having given only legacies, and no land, the words, "*all the rest and residue of his estate,*" were relative, and must be intended of estate of the same nature with that he had before devised, which was only personal; for having before
182 * given no real *estate, there could be no rest or residue of that, out of which he had given away none. Then the words "*chattels, real and personal,*" explained the word "*estate,*" and showed what sort of estate he meant; and made the devise as if he had said, "all the rest of my estate, whether chattels real or personal," &c.; and so confined and restrained the extended sense of the word "*estate.*" (*a*)

88. A testator devised as follows: "All those my freehold lands and hop grounds, with the messuages or tenements, barns, &c. in the tenure of L.; and all other the rest, residue, and remainder of my estate, consisting in money, plate, jewels, leases, judgments, mortgages, &c. or in any other thing whatsoever or wheresoever, I give to A. B. and her assigns forever." Justice Fortescue, at the Rolls, held that the residue of the testator's real estate did not pass by this devise; for although the word "*estate,*" when unrestrained, would include lands as well as personal estate, yet here it was expressly confined to personals, as plate, &c.; and had the testator intended to give all his real estate, why did he mention a part of it only? (*b*)

89. In a modern case, the Court of King's Bench held, that

(*a*) Markant *v.* Twisden, 1 Ab. Eq. 211.

(*b*) Timewell *v.* Perkins, 2 Atk. 102. Camfield *v.* Gilbert, 3 East, 516. Goodtitle *v.* Miles, 6 East, 494. Bebb *v.* Penoyre, 11 East, 160. Dunnage *v.* White, 1 Jac. & W. 583.

the words, "*residue and remainder of effects*," did not extend to real estates; from the apparent intention manifested by the testator, of not extending the word "*effects*," to real estates. (*a*) [1]

90. With respect to *additional words*, the Courts appear to have always been disposed to adopt the rule, established for the construction of deeds; namely, that where there is a correct and *specific* description of the property devised, *a mistake in any additional words will have no effect.* But where the first description is merely general, there additional words will be considered, either as explanatory or restrictive, according to the intent of the testator. (*b*) [2]

Thus, in the following cases, a mistake in the additional words was held to have no effect.

91. A person, being seised in fee of a house called the White Swan, in Old-street, devised it in these words: "I devise the house or tenement wherein William Nichols dwelleth, called the White Swan, in Old-street, to H. G., my daughter's son, forever." The jury found that the said W. Nichols, at the time when the will was made, and when the testator died, occupied the alley of the said house, and three upper rooms; and that *divers other persons occupied the garden, and other *183 places in the said house. (*c*)

(*a*) Doe *v.* Hurrell, 5 Barn. & Ald. 18. (*b*) Tit. 32, c. 21, § 56.
(*c*) Chamberlain *v.* Turner, Cro. Car. 129.

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[1] As to the construction and effect of a devise of all the residue and remainder of the testator's estate, or effects, &c., and what passes thereby, see Den *v.* Grew, 2 Green, 68; Birdsall *v.* Applegate, 1 Spencer, 244; Blagge *v.* Miles, 1 Story, R. 426; Bradford *v.* Haynes, 2 Applet. 105; Fleming *v.* Bolling, 3 Call. 75; Rathbone *v.* Dyckman, 13 Paige, 9; Van Kleck *v.* Dutch Ref. Church, 6 Paige, 600; Mitford *v.* Reynolds, 12 Jur. 197; Davy *v.* Daveron, 12 Sim. 200; Martin *v.* Glover, 1 Coll. N. C. 269; Evans *v.* Crosbie, 11 Jur. 510; 16 Law Journ. 494, Chan.; Inderwick *v.* Inderwick, 13 Sim. 652; Brailsford *v.* Heyward, 2 Desau. 32; O'Neale *v.* Ward, 3 H. & M'H. 93; Horde *v.* M'Roberts, 1 Call, 337; Gall *v.* Esdaile, 8 Bing. 323; Doe *v.* Saunders, Cowp. 420.

[2] [Where a testator in Pennsylvania gave to his wife a life-estate in the homestead and two lots, and charged upon his real and personal estate an annuity to her, but did not mention his lands in any other part of the will, and then, after sundry legacies bequeathed the "surplus, be the same more or less," to be applied to the purposes of the Presbyterian Church, it was held that this surplus did not relate to his lands, which his heirs would take. Allen's Ex'ors *v.* Allen, 18 How. U. S. 385; see also Drew *v.* Drew, 8 Foster, N. H. 489.]

The question was, whether all the house passed, or only the entry, and the three rooms which were in the possession of W. Nichols.

The Ch. J., Hyde, doubted; but Jones, Whitlock, and Croke, were of opinion that all the house passed to the devisee; for the devise being, "that house or tenement," and the conclusion, "called the White Swan," did both of them necessarily import the whole house. For the sign of the White Swan could not be intended to refer to the three rooms: and the words after, viz. "wherein W. Nichols dwelleth," did not abridge or alter that devise; and the house being named by the particular name of the White Swan, although W. Nichols never inhabited it, but only occupied three rooms, passed by the devise. If the house had not been described by the particular name of the White Swan, and the testator had devised the house in the occupation of W. Nichols, there, peradventure, it should not extend to more than what was in the occupation of W. Nichols. (*a*)

92. A testator devised all the profits of his houses and lands, lying in the parish of Billing, and in a street there, called Brooke-street, to his wife: when in truth there was no such parish as Billing; but the land supposed to be devised was in Billing-street. All the Court held the will to be good. (*b*)

93. A person made his will in these words: "I devise to S. J. all those my lands in Bramstead, in the county of Surrey, in the possession of John Ashley;" whereas, in fact, the testator had not any lands in Surrey; but he had lands at Bramstead in Hampshire, in the possession of John Ashley. In an ejectment brought for these lands in Hampshire, by the heir of the testator, against the devisee, it was ruled by Lord Holt, that they passed by the devise. (*c*)[1]

(*a*) Down *v.* Down, 7 Taunt. 343. Blague *v.* Gold, Cro. Car. 447.
(*b*) Pacy *v.* Knollis, Brownl, 131. (*c*) Hastead *v.* Searle, 1 Ld. Raym. 728.

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[1] A testator, having estates in the *liberties* of the city of Hereford, and also estates in the *county* of Hereford, devised to trustees "all my freehold, copyhold, and leasehold messuages, lands and hereditaments in the *city* of Hereford, or the *liberties* thereof in the county of Hereford and my two houses on Ludgate-hill, in the city of London;" with power to sell. In a codicil, referring to this power of sale, he said, "the sale thereby authorized of Pool House, and of my other estates in the *city* and *county* of Hereford." It was hereupon held, that his estates in the *county*,

94. Sir B. Broughton Delves, having entered into written contracts for the purchase of the manor of Clatford, and the manor of Abbots Ann, and also the advowson of the parish church of Abbots Ann, and having purchased the advowson of Mottisfont, which was actually conveyed to him, all which estates and advowsons were in the county of Hants, made his will, in which were the following words: "I give and devise all the manors, *messuages, *advowsons*, farms, lands, tenements, *184 &c., situate and being in the county of Hants, for the purchase† whereof I have already contracted and agreed." (*a*)

The question was, whether the advowson of Mottisfont, which had been actually conveyed to the testator at the time of making his will, passed by this devise.

The Court of Common Pleas was unanimously of opinion that the advowson did not pass by the will; for the testator spoke only of those estates in Hants which were under contract, not those of which the sale was completed. (*b*)

Upon a writ of error in the King's Bench, this judgment was reversed; upon the principle, that the Court could not reject the word "*advowsons*," in the plural number; as it appeared the testator meant the word "*advowsons*" should have its full force and effect.

On a writ of error in the House of Lords, the judgment of the Court of King's Bench was affirmed, with the concurrence of a majority of the Judges present; but contrary to the opinion of Lord Chancellor Apsley and Lord Camden. (*c*)

95. In the following case, additional words were held to be explanatory, and not restrictive of the preceding ones.

96. Doctor Paul devised to his wife his farm at Bovington, in the tenure and occupation of J. Smith. He devised to her several other estates in the same manner; and concluded by a general devise to her of all his freehold and copyhold lands

(*a*) St. John *v.* Bp. of Winton, Cowp. 94. S. C. 2 Bl. R. 930. (*b*) 2 Bl. R. 930.
(*c*) 3 Bro. Parl. Ca. 375. Doe *v.* Greathed, 8 East, 91. Doe *v.* Pigott, 7 Taunt. 553.

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but not within the city nor liberties, did not pass to the trustees. Moser *v.* Platt, 8 Jur. 389.

[† In the recent case of Meyrick *v.* Meyrick, 1 Cr. & Mee. 820, an estate which the testator had obtained *in exchange*, was held to pass under the description of estates which the testator had *purchased*.]

above devised. The farm at Bovington was copyhold, and was demised to J. Smith, with an exception of the woods and underwoods. (*a*)

The heir at law brought an ejectment for the woods; and the question was, whether they passed by the will, not being in the tenure and occupation of J. Smith?

Lord Mansfield held, that the words, "*in the tenure and occupation of J. Smith*," were not words of restriction, but of additional description. Had the testator meant them as restrictive, he would have said,—all that part of my farm, or so much of my farm as is in the tenure, &c. The farm was an entire thing.—

Judgment was given for the devisee. (*b*)

185* *97. [But in the case of Doe *v.* Parkin, the testator having two messuages in T., of which one only was in his own occupation, devised all his messuages, &c. in T., and then, *in his own* occupation, with the appurtenances to W. The Court of C. B. decided, that only that one passed in the testator's own occupation. The Court observed that Blackstone reports, that in St. John *v.* Bishop of Winton the other three barons concurred with the Court of Common Pleas, which opinion was also strongly supported by Lord Apsley, Chancellor, and Lord Camden, the only two law lords who were present in the House of Peers, and it was afterwards proposed to rehear it; therefore the authority of that case was not of much weight.] (*c*)

98. The Courts have gone so far as to determine, that where the words used by a testator are *only applicable, in their strict technical sense, to a species of property which the testator has not*, they shall be *applied, if possible, to some other species of property, which the testator has*, in order to effectuate his intention: for in cases of this kind, it is clear the testator has been ignorant of the technical meaning of the words which he used; but as he must have had some intention when he used them, the Courts, in order to give effect to that intention, will apply such words to the property to which the testator appears to have intended to apply them.

99. A person being seised of a fee-farm rent issuing out of

(*a*) Paul *v.* Paul, 2 Burr. 1089. 1 Black. R. 255.

(*b*) Marshall *v.* Hopkins, 15 East, 309. [*Ante*, § 61, note;] Doe *v.* Jersey, 1 Barn. & Ald. 550.

(*c*) 5 Taunt. 321. *Supr.* § 94.

the manor of F., and having no land or manor, devised his manor of F. to J. S. It was held, that these words passed the fee-farm rent; for the devisor being seised of that rent, and of nothing else in the manor, it was plain he meant the rent, and could mean nothing else; so that otherwise the will must have been entirely void. (*a*)

100. A person devised all his freehold houses in Aldersgate street to the plaintiff and his heirs. The testator had no freehold houses there, but had leasehold houses. It was decreed by Mr. Justice Tracy, that though, in a grant of all one's freehold houses, leasehold houses could not pass; and that in the case of a will, had there been any freehold houses to satisfy the will, the leasehold houses should not have passed; yet the plain intention of the testator being to pass some houses, and he having no freehold houses there, the word "*freehold*" should rather be rejected, than the will be wholly void, and the leaseholds should pass. (*b*)

*101. When a testator uses *general words, equally applicable to freehold and leasehold property*, they have in *general been restrained to freeholds*, if the testator has both freehold and leasehold property, unless a contrary intention appear; and will only be applied to leasehold property, where the testator has no freehold property to satisfy them. *186

102. It was resolved by the Court of King's Bench, in 8 Cha. I. "that if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years. And if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, the lease for years passeth; for otherwise the will should be merely void." (*c*)[1]

(*a*) Inchley *v.* Robinson, 3 Leon. 165. (*b*) Day *v.* Trig, 1 P. Wms. 286. *Infra.*
(*c*) Rose *v.* Bartlett, Cro. Car. 292.

[1] The former of these propositions has been assented to with considerable reluctance, from the conviction that it subverted the intention of testators, who employ general words of this nature in a comprehensive sense, and without having in view the purely technical distinction respecting the quality of the estate. This rule, of course, will yield to an indication of the testator's intention; and therefore, if, upon the whole will, it can be collected that he intended that the leaseholds should pass with the freeholds, under a general devise, it will be so construed. And perhaps the use of words of limitation, adapted to a chattel interest, might be regarded as evidence of such intention

103. Lady Boreman being seised in fee of lands in Kent, and possessed of a mortgage for years in Essex, and also of an extended interest upon a statute in Bucks, devised all her manors, messuages, lands, tenements, hereditaments, and real estate whatsoever, in Kent, Essex, Bucks, Bedfordshire, or elsewhere in the kingdom of England, of which she was any ways seised or entitled to, unto her nephew. By a latter clause, the testatrix gave all the rest, residue, and remainder of her personal estate, plate, gold, &c., and all her mortgages, bonds, specialties, and credits, whatsoever they should consist of, to her nephew and niece. (*a*)

The question was, whether the chattel interests of the testatrix passed by the first clause in the will.

Lord King decreed that they did not; and this decree was affirmed by the House of Lords.

104. The doctrine, established in the two preceding cases, has been, in some degree, contradicted by the three following cases, in which general words have been applied both to freehold and leasehold property.

105. T. Addis being seised in fee of some lands, and possessed of other lands under a lease for twenty-one years, all in the possession of A. B.; and it being very difficult, by reason of long unity of possession, to distinguish the freehold from the leasehold premises; devised all his messuages, lands, and tenements, in the parish of D., which he then stood seised or possessed of, or in any ways interested in, and which were in the possession of A. B., unto his wife Jane, for her life; remainder to his brother, and the heirs of his body; remainder over. (*b*)

(*a*) Davis *v.* Gibbs, 3 P. Wms. 26.

(*b*) Addis *v.* Clement, 2 P. Wms. 456.

See 1 Jarm. on Wills, 617, 620; Hobson *v.* Blackburn, 1 My. & K. 521; Goodman *v.* Edwards, 2 My. & K. 759; Fitzroy *v.* Howard, 3 Russ. 225; Weigall *v.* Broome, 6 Sim. 99.

This rule, however, is now abrogated, in England, by the act of 1 Vict. c. 26, which enacts, that by a general devise, which would describe leaseholds if the testator had no freehold estate, his leaseholds shall pass though he have freeholds, if a contrary intention do not appear.

Whether this rule would now be held applicable to devises, in those American States in which a devise, without words of limitation, is deemed to pass all the devisor's interest in the estate which is within the description,—*quære;* and see *infra*, ch. 11, § 2, note.

*Lord King said, the question was, whether the lease- *187
hold passed with the freehold; he owned the limitations were improper, but then the words were very strong;—all the lands which the testator was seised or possessed of, or any ways interested in; which words, "*possessed of or interested in*," properly referred to a leasehold estate; and distinguished this case from that of Rose *v.* Bartlett, where the words "*possessed of, or any ways interested in*," were not to be found. And as the lease for twenty-one years was held of the church, and always renewable, the lessee, who was the testator, might look upon himself, from the right he had to renew, as having a perpetual estate therein, a kind of inheritance: therefore the leasehold premises ought to pass by the will. And decreed accordingly.

106. Sir J. Lowther having freehold and leasehold estates in the county of Cumberland, devised in these words:—"I give all my manors, lands, tenements, mines of coal and lead, rents, and hereditaments whatsoever, in Cumberland, to J. Lowther in tail. And whereas I am owner of several burgage tenures in Cockermouth, it is my will they shall not be entailed, as I have done my other estates in Cumberland; and therefore I devise them to Sir W. Lowther and his heirs." (*a*)

A question arose, whether the leasehold estates passed by the devise to J. Lowther, or to Sir W. Lowther, the residuary legatee.

Lord Keeper Henley said, it was plain, from the clause excepting the burgage tenures, that the testator thought he had entailed these leaseholds upon James Lowther. The word "*estates*," in the will, was a general term, and comprehended both freehold and leasehold, and was not restrained to either. But it was said, that he having both sorts of estates, by the general words, estates of inheritance only passed, according to the case of Rose *v.* Bartlett, a single authority, where it was held, that the words "*lands and tenements*," related to estates of inheritance only. That resolution might be law in that particular case, though he could see no reason why those words should not include leaseholds too, as they had been held to do where other words were added, as in Addis *v.* Clement; *lands in which he was any way interested.* In the present case, there were words

(*a*) Lowther *v.* Cavendish, Amb. 356. 1 Eden, 99.

inserted which were material to pass leaseholds, as *mines, rents;* which it would be strange to suppose him to devise, without
188* * the lands of which they were the profits, and from whence they flowed. He could never intend to give them in the residuary clause, after he had before specifically devised every estate he had. (*a*)

107. A testator being seised of tithes in fee, and having a lease of other tithes for years, perpetually renewable, without fine, devised all his lands, tenements, tithes, &c., to the defendant. The plaintiff, being the personal representative of the testator, filed his bill for the leasehold tithes; insisting that the freehold tithes only passed by the will. (*b*)

Mr. Baron Eyre, sitting for the Chancellor, said the case of Rose *v.* Bartlett had been often referred to and acknowledged; one could not but respect a case so supported, yet one could not help asking why, by so general an expression, all the lands should not pass? No reason was given in the cases; there was none arising from the favor shown to an heir at law; for the ordinary or next of kin were not considered in that light. There was none from the general rules of construction. If the words were the same, and the testator had only one interest, that would pass; if he had different interests, the intent seemed to be the same; why should not the whole pass? There was but little reason in saying that the freehold satisfied the words. By the case of Paul *v.* Paul, (*c*) general words were not to be restrained, unless the Court saw abundant reason to think that the testator meant to use them in a restrained sense. The words were large enough. The determination of Rose *v.* Bartlett, was very early: he was led to think the old idea of the dignity of the freehold, and small value of the *interesse termini*, led to it. The leaseholder was held to be a mere pernor of the profits. From the change of circumstances, the rule was now become unsatisfactory; the Court was considering the intent of a testator; it was a degree of strictness inconsistent with the present state of things, to say that a man by his lands does not mean all. He did not mean to deny the authority of Rose *v.* Bartlett; but he could not build upon it and take the construction for

(*a*) Whitaker *v.* Ambler, 1 Eden, 151.
(*b*) Turner *v.* Husler, 1 Bro. C. C. 78.
(*c*) *Ante*, § 96.

tithes here, that was applied there for lands. He was not prepared to say, that the word "*tithes*" would not pass the leasehold as well as the freehold. The form here was a lease, but being renewable, it was as much the testator's as his inheritance. The case of Addis *v.* Clement (*a*) *was argued from the intent; the limitations here were fit for an estate of inheritance. He inferred from this, that the power of renewal had made the testator forget that he had not the inheritance. As to there being no mention of a renewal, this was not upon a fine, so there was no need to raise a fund for that purpose. In common understanding, chattels real are real estates. The case of Addis *v.* Clement was very near this case: he admitted the words, "*possessed of and interested*" *in*, made that case stronger; but the leading principles were the same. He was glad to be supported by such a case, in the opinion he should give, namely, that the leasehold tithes did pass. *189

108. There is however a case determined by Lord Hardwicke, and another by Lord Mansfield, in which the rule laid down in Rose *v.* Bartlett was adhered to; and general words restrained to freehold estates, in exclusion of leaseholds.

109. A person, having freehold and leasehold lands in the same parish, devised in the following words; "I give, devise, and bequeath unto Martha, my wife, for life, all my estates in L.; and after her death, I give, devise, and bequeath the aforementioned estates to my daughter Ann, and her heirs forever. *Item*, I give and bequeath unto my wife all my goods and chattels, and all other things not before bequeathed." (*b*)

Martha, the devisee, married again, and had the plaintiff by her second husband; who insisted that by the devise to the wife of the residue, the leasehold lands passed to her; and claimed as executor of his mother, who was the executrix of the testator; saying, that as there were both freehold and leasehold, nothing but the freehold passed to the defendant, being sufficient to answer the word estates in the will.

Mr. Murray, for the plaintiff, cited the case of Rose *v.* Bartlett, to show, that if words are used applicable to both, they will, by way of eminence, pass only fee simple lands; and that the limitations were proper only to the devise of a freehold estate, and

(*a*) *Ante*, § 105. (*c*) Knotsford *v.* Gardiner, 2 Atk. 450.

therefore the testator did not intend to pass the leasehold likewise. For the defendant, it was said, that the wife of the testator had these very freehold lands settled upon her in marriage, and the testator had no other freehold, but a little cottage of very small value.

Lord Hardwicke observed, that as the facts were not fully before him, it must go to a trial at law. He stated the
190* rule *laid down in Rose *v.* Bartlett, and said, "Though in the present case I have no doubt at all as to the intention of the testator, yet the rule of law would prevail."

110. A testator, being seised of freehold estates of considerable annual value, and also possessed of two terms for years, devised all his manors, and all and every his several messuages, lands, tenements, and hereditaments whatsoever, and wheresoever, which he was seised of, interested in, or entitled to, lying and being within the several counties of N. E. &c., to his son for life, with impeachment for all wilful waste; and from and after his decease, to the heirs of his body. (*a*)

This case was twice argued in K. B. The Court, upon very full consideration, and with some reluctance, determined that the two leasehold farms did not pass by this devise. Lord Mansfield, in delivering the judgment of the Court, stated the will at length, and said he did so in order to show that there were no words in the will, except the devise itself, which indicated any intention in the testator to convey the leasehold premises; and that although the words of the devise were very comprehensive, yet a system of legal construction had been established in former cases, especially Rose *v.* Bartlett, and Davis *v.* Gibbs, which precluded them from considering the intention of the testator on the words of the devise, as they might otherwise have done, and bound them in the decision of the principal case.

111. The rule laid down in Rose *v.* Bartlett has been, in some degree, departed from by the Court of K. B. in the following case:—

112. H. Bosville, being seised of several freehold estates, and possessed of a part of a farm held under the church for twenty-one years, renewable, held with another part of the farm, and let together as one; devised all his manors, messuages, houses,

(*a*) Pistol *v.* Riccardson, 1 H. Black. 26, n. 2 P. Wms. 459, n.

farms, lands, woodlands, hereditaments, and real estate whatsoever, to R. B. for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainder over; and gave all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate, to R. B. forever. (*a*)

Upon a question, in a suit in Chancery, whether the word **farms* carried the leasehold under the first devise, *191 a case was sent to the Court of K. B. for their opinion.

Lord Kenyon said, he would say a few words to show the foundation of his opinion. It was the duty of the Court, in construing a will, to give effect to the devisor's intention, as far as they could consistently with the rules of law, not conjecturing, but expounding his will from the words used. Where certain words had obtained a precise technical meaning, they ought not to give them a different meaning; that would be, as Lord King and other Judges had said, removing landmarks: but if there was no such appropriate meaning to the words used in a will, if the devisor's intention was clear, and the words used were sufficient to give effect to it, they ought to construe those words so as to give effect to the intent, and not to doubt on account of other cases, which tended only to involve the question in obscurity. On the whole of this will, taking it together, he had no doubt. The devisor had two kinds of property, real and personal. It appeared by the case, that a part of a farm, held by lease under the Archbishop of Canterbury, had been for a long course of years in the testator's family, and was considered almost equivalent to a perpetuity, on account of the covenant to renew, and that, as far as it could be traced, it had been let by the testator and his family, together with the rest of the farm, which was an estate of inheritance, and which belonged to them, as one farm, to the same tenant, under one integral rent: every one must be aware of the inconvenience of splitting this farm, on account of the apportionment of rent, and the power of distress; and perhaps it would be difficult for either party to occupy it beneficially. The testator, having this various property, sat down to make his will, and he devised all his manors, messuages, or tenements, houses, farms, lands, woodlands, hereditaments,

(*a*) Lane *v.* Stanhope, 6 Term R. 345.

and real estate whatsoever and wheresoever, unto R. B., &c. In many cases that might be put, he should not lay much stress on the word "*farm;*" whether it should have much or little weight must depend upon the subject. Then, after giving some pecuniary legacies, the testator added a residuary clause, by which he gave all the rest and residue of his ready money, rents in arrear, stock in any of the public funds, jewels, and personal estate, unto R. B., &c. Now, if this will were to be read
192* by any *person not fettered with legal and technical notions, he would not hesitate about the intention, but would say that all the landed property, without considering the circumstances of that landed property, was disposed of by the first clause, and all the personal property by the last. It was material to observe, that the first words in the residuary clause applied to money, after which it was not to be supposed that the testator intended to recur to the land; he having, in the former part of his will, used words sufficiently comprehensive to include every species of landed property. He admitted, that several of the limitations which were applied to real estate, were inapplicable to the species of property in dispute; but he thought it would be too much to say, that that observation alone should preclude the idea that the testator intended to pass the leasehold part of the farm, under the words used in the first clause; as it was well known how frequently many of the limitations, used in a will, were inapplicable to every species of property disposed of by it. He did not wonder that the Court determined the case of Pistol *v.* Riccardson with reluctance; for it appeared that that case came before the Court at several different times. He only lamented that the case of Addis *v.* Clement was not then cited; for Lord Mansfield seemed to feel himself pressed, by a torrent of authorities, to decide contrary to his better judgment. And he could not forbear thinking, that if Addis *v.* Clement had been mentioned, the Court would have decided the other way with less reluctance. The reason why they determined, in that case, that the leasehold farm did not pass by that will was, because they thought that all the words there used had received in other cases a certain technical construction, and therefore that they were bound by those decisions. But the Court had not that difficulty to encounter in this case, because here they find another word in

the will, "*farms*," which in its general signification means that which is held by a person, who stands in the relation of tenant to a landlord. The extrinsic circumstances also weighed strongly in this case. Therefore, taking into consideration the residuary clause, in which the *items* enumerated were all personal chattels, and that the testator did not mean to die intestate as to any part of his property, though the property in dispute was a personal estate, yet as it was connected with land, he thought the construction *that the family had put upon the whole *193 will was the true one.

The following certificate was afterwards sent to the Court of Chancery :—" We have heard this case argued, and considered the effects of this will, and are of opinion, taking the whole will together, that the leasehold property in question is not included in the residuary bequest, but passed by the prior devise ; although some of the limitations applied to the real estates are inapplicable to this species of property."

113. In a subsequent case, Lord Ch. J. Eldon and the other Judges of the Court of Common Pleas held, that the rule, laid down in Rose *v.* Bartlett, was a rule of property not to be shaken ; and therefore that, under a general devise, leaseholds did not pass unless there was something to show an evident intention that they should pass.

114. Mr. Thompson, being seised of the manor of W., and other freehold estates in Yorkshire, and possessed of two leasehold houses, devised his manor of W., and all other his manors, messuages, lands, tenements, and hereditaments, to trustees and their heirs, to the use of his first and other sons of his body in tail male; with several remainders over, in strict settlement; and devised all his money, securities for money, goods, chattels, and effects, and all other his personal estate, not before disposed of, to his brother and sister. (*a*)

Upon a case, sent by the Court of Chancery to the Court of C. B. the question was, whether the leasehold passed under the first general devise.

Lord Eldon stated the reasons for the certificate ; and after observing that Lord Kenyon had said, in the preceding case, that it was the duty of courts of justice to give effect to the devisor's

(*a*) Thompson *v.* Lawley, 2 Bos. & Pul. 303. 5 Ves. 476. (Watkins *v.* Lee, 6 Ves. 633.)

intention, as far as they could consistently with the rules of law, not conjecturing, but expounding his will from the words used; and that he was particularly impressed with the latter expression, "not conjecturing, but expounding his will from the words used;" he said, that whether the rule laid down in Rose *v.* Bartlett were wisely adopted or not, it was unnecessary to determine; but that case having once established a general rule, he had rather consent pointedly and avowedly to contradict
194 * that rule in terms, than to acknowledge it in words * and deny it in effect, by raising distinctions which in fact made it impossible for any man to decide, in any particular case, what was the legal construction of a will, as to this point, till he had obtained the authority of a court of law, in a judgment upon the will, for the opinion which he gave. That it did not appear that there was any equitable right of renewal, nor even the premises in question blended, in enjoyment or otherwise, with any freehold land; there was no difficulty in distinguishing them from each other, they had never been demised together, at one rent, reserved to heirs; they were short terms. No one of those particular circumstances, which were relied upon in former cases, existed in this. It was the simple case of terms for years, and a case of property, *primâ facie* that sort of property which a disposition of personal estate must be intended to pass. The estates included in the general devise were limited to the issue of the devisor in tail, with several remainders over. He entered into an examination of all the preceding cases, and concluded by saying, "The rule in Rose *v.* Bartlett is a rule which has been acknowledged for ages, and upon which I shall act, until I am informed by the highest authority that I am no longer to regard it; till I shall be so informed, I shall substantially regard it in judgment; for I think it better to overrule it altogether, which I must not do, than to deny to it its effect, upon grounds which do not completely satisfy my mind, as solid and safe grounds of distinction."

All the other Judges said, the rule in Rose *v.* Bartlett ought not to be shaken; and the Court certified that the leasehold houses did not pass by the general devise.

115. [In the recent case of Doe *v.* Ludlam, C. J. Tindall observes, there was no reason, in the principal case, for departing

from the general rule, which was first laid down in Rose *v.* Bartlett; a rule which had been followed ever since. (*a*)

116. It should here be noticed, that the above rule in Rose *v.* Bartlett, and which has been the subject of so much discussion, is applicable only to leaseholds *for years*, since leaseholds for lives, though granted to the lessee, his executors, and administrators, are freehold interests, though of the lowest kind: and it has been decided, in a recent case, that they will pass under a general devise of real estate.] (*b*)

117. With respect to the *words necessary to pass estates in *reversion*, wherever a testator shows an intention to *195 dispose of all his property by his will, and uses words sufficient for that purpose, any estates to which he is entitled in reversion will pass.

118. A person, having a manor and other lands in Somersetshire, devised the manor to A, for six years, and part of the other lands to B, in fee, and then came this clause: "*And the rest of my lands, in Somersetshire or elsewhere, I give to my brother.*" It was adjudged, that the reversion of the manor passed by the word "*rest.*" (*c*)

119. A person settled part of his lands on his daughter, for life, and devised another part to his wife for a year after his death; and then devised "*all his lands, not settled or devised,*" to T. K. and his heirs. Adjudged, that the reversion of the lands settled on his daughter, passed by this devise. (*d*)

120. A person, being seised in fee, devised Blackacre to A, for life, and devised to B "*all his lands not before devised,*" to be sold, and the money to be divided between his younger children. The question was, whether the reversion of Blackacre passed by the devise of all his lands not before devised; and it being referred to the Judges of C. B., they certified, that the reversion was well devised. (*e*)

121. A person devised a house to A and his wife, for their lives; and then, the better to enable his wife to pay his legacies, he devised to her "*all his messuages, lands, tenements, and here-*

(*a*) 7 Bing. 280. Also see Hobson *v.* Blackburn, 1 Myl. & K. 571.
(*b*) Fitzroy *v.* Howard, 3 Russ. 225. See also 6 Ves. 642.
(*c*) Wheeler *v.* Walroone, Aleyn, 28. 3 P. Wms. 63, n. E.
(*d*) Cooke *v.* Gerrard, 1 Lev. 212. 1 Saund. 180. Doe *v.* Brazier, 5 B. & Ald. 64, 68.
(*e*) Rooke *v.* Rooke, 2 Vern. 461.

ditaments whatsoever, within the kingdom of England, not before disposed of, to hold to her and her heirs." It was also found that the testator left sufficient to pay his legacies, without the reversion of the house. (*a*)

The Court of King's Bench determined, that the reversion of the house did not pass; but this judgment was unanimously reversed in the Exchequer Chamber. (*b*)

122. A person, who was tenant for life, remainder to his first and other sons in tail, with the reversion in fee in himself, having a son and daughter, devised "*all his lands, tenements, and hereditaments,*" to his daughter in fee, in case his son should die without issue. The son did die without issue; and Lord Holt said, though the testator had only a dry reversion in fee, yet that by the words, "all his lands, tenements, and hereditaments," such reversion would pass. (*c*)

196* *123. The words, "*all my lands out of settlement,*" as also the words, "*not by me formerly settled,*" will comprehend reversions in fee after estates tail.

124. Sir W. Lytton, being tenant in tail after possibility, of some lands, remainder in fee to trustees, in trust for himself and his heirs; and being also tenant in tail of some other lands, remainder to the right heirs of his father, and having no issue, devised all his messuages, lands, tenements, and hereditaments whatsoever, *out of settlement*, to his nephew, Lytton Strode, and his heirs. The question was, whether the different reversions, to which he was entitled, should pass by this will. (*d*)

Lord Cowper, assisted by the Master of the Rolls, Lord Ch. J. Trevor, and J. Tracy, decreed that the reversions passed by the will. And on an appeal to the House of Lords, this decree was affirmed, upon the principle, that by the words, "lands out of settlement," the reversion in fee passed; for the same lands may be said to be settled and unsettled, namely, settled as far as the use thereof is limited, and unsettled as to the reversion.

125. Sir J. Chester, on the marriage of his eldest son, settled lands of £800 per annum on his eldest son for life, remainder, as

(*a*) Willows *v.* Lydcot, 2 Vent. 285. 3 Mod. 229.
(*b*) See also Doe *v.* Brazier, 5 Bar. & Ald. 64.
(*c*) Dalby *v.* Champernoon, Skin. 631. Fletcher *v.* Smiton, *infra*, c. 11, § 54.
(*d*) Falkland *v.* Lytton, 3 Bro. Parl. Ca. 24. S. C. 2 Vern. 621.

to part, to the wife of his son for life, remainder to the first and other sons of that marriage in tail male, remainder to his son and his heirs male on any other wife, remainder to himself in fee. And being seised in fee of other lands in possession, in Littleton, Marston, and Milbroke, he devised all his lands, tenements, and hereditaments in these three places, "*or elsewhere, not by him formerly settled, or thereby by him otherwise disposed of*," to trustees for a term of 100 years, upon the trusts therein mentioned, remainder to his youngest son in fee. (*a*)

The eldest son died, leaving six daughters; and the question was, whether the reversion of the estate, settled on the eldest son, should pass by this devise.

It was decreed by Lord King, assisted by Lord Raymond and another Judge, I. That the word "*elsewhere*" was the same as if the testator had said he devised all his lands in the three places particularly mentioned, or in any other place whatever; and that there was no reason to reject so plain, proper, and intelligible a word in a will as this, which, probably was inserted to avoid the prolixity of naming the several other places in which the *premises lay; it being a great estate, and diffi- *197
cult, at the time of making the will, when the testator might be supposed to be *inops consilii*, and without his writings, to particularize all the towns. That the word *elsewhere* was therefore the most significant, sensible, and comprehensive word that could be used for that purpose, equivalent to the naming of them. And it would be of the most dangerous consequence, under pretence of construing this will, and assisting the testator's intentions, to reject a word so material to be made use of, both for the sake of brevity and security.

II. That the words, "*not otherwise by me settled*," could have excepted only that estate in the lands which was otherwise before settled; whereas it was plain that the reversion in fee was not settled, and therefore ought to pass by the will. The reversion in fee of the lands in question not being settled, the lands, as to such reversion, were not settled; so that the same lands in several respects, might be said to be settled and unsettled; viz., with regard to all the particular estates which were limited, the lands might be said to be settled; though with regard to the

(*a*) Chester *v.* Chester, 3 P. Wms. 56.

reversion in fee, it might be properly said, that the lands were not settled; and the reversion in fee, which remained unsettled, was part of the old estate, whereof the owner continued seised. (*a*)

126. Mr. Tracey, being seised of estates in the counties of Gloucester and Worcester, and also entitled to the reversion of certain estates in the counties of Oxford and Wilts, devised "*all and every his manors, messuages, lands, tenements, hereditaments, and premises, in the counties of Gloucester and Worcester, and elsewhere in the Kingdom of England,*" to trustees, subject to certain charges thereon, and to certain limitations and estates to all his brothers, by his marriage settlement. The estates in the counties of Gloucester and Worcester were the only ones charged or mentioned in his marriage settlement. The question was, whether the reversion in fee of the estates in Oxfordshire and Wilts, passed by the will. (*b*)

It was contended, that from the words of the will, referring to the limitations of estates in Gloucestershire and Worcestershire, and the charges thereon, it was manifest the testator had no other estates than those in contemplation at the time of making his will. But the Court of King's Bench certified, that
198* the reversion *in fee of the estates in Oxfordshire and Wiltshire passed by this devise.

127. E. Atkyns, being seised in fee in possession of the manor of Coates, in the county of Gloucester, and to an estate there called Pinbury Park; and being likewise entitled to the reversion in fee of the manor of Sewell, in the said county of Gloucester, expectant on the estates tail of three persons then living, made his will, and thereby devised as follows:—"I give, devise, and bequeath all that the manor or lordship, or reputed manor or lordship of Coates, in the county of Gloucester, with the rights, royalties, and appurtenances, and also all and every the messuages, farms, lands, tenements, advowsons, and hereditaments whatsoever of me, the said E. Atkyns, situate, lying, and being within or adjoining to the said manor or lordship, and also all that my capital messuage or tenement, and all and every my lands, tenements, and hereditaments whatsoever, whether freehold or lease-

(*a*) Glover *v.* Spendlove, 4 Bro. C. C. 337. Att.-Gen. *v.* Vigor, 8 Ves. 256.

(*b*) Freeman *v.* Chandos, Cowp. 363. Doe *v.* Bartle, 5 B. & Ald. 492. (Doe *v.* Phillips, 1 T. R. 105.)

hold, situate and being at or in or near Pinbury Park, or elsewhere in the said county of Gloucester, with their appurtenances; and all my estate, term of years, and interest therein, unto and to the use of my executors," &c. Upon trust, to sell the same for the benefit of his younger children. (*a*)

Several years after the death of the testator, the reversion of the manor of Sewell came into possession; and a question arose between the heir at law and the younger children, whether it passed by the will. A case was made by Lord Thurlow for the opinion of the Court of King's Bench, who certified that it did pass to the executors, by the express words of the will.

The Chancellor ordered, that the Judge's certificate should be confirmed. From this order an appeal was brought to the House of Lords; and a question having been put to the Judges, whether the reversion of the manor of Sewell passed by the will, the Lord Chief Baron delivered their unanimous opinion, that the reversion in fee of the manor of Sewell did pass by the will; whereupon the decree was affirmed. (*b*)

128. It has been held, in two modern cases, that where there are *general words in the residuary clause of a will*, they carry every estate and interest which is not expressly, or by necessary implication, excluded from its operation; and therefore carry all reversions. (*c*)

*129. But as the intention of the testator is the rule by *199
which all wills are construed, where it is manifest that a testator does not intend to devise a reversion by general words, such reversion will not pass. (*d*)

130. A. Mervin, on the marriage of his eldest son Henry, settled the manor of Arlestown on himself for life, remainder to his son Henry for life, remainder to the first and other sons of Henry in tail, &c. with the reversion in fee to the father. A. Mervin had issue three other sons, Audley, James, and Theophilus, and four daughters; and being seised of other lands in fee simple, he made his will, by which he devised all those lands, whereof he was seised in fee simple in possession, to his wife; and also all other the lands, tenements, and hereditaments, whereof he was

(*a*) Atkyns *v.* Atkyns, Cowp. 808.

(*b*) 3 Bro. Parl. Ca. 408. Doe *v.* Meakin, 1 East, 456, S. P.

(*c*) Goodright *v.* Downshire, 2 Bos. & Pul. 600. Doe *v.* Weatherby, 11 East, 322. See also Church *v.* Mundy, 15 Ves. 396.

(*d*) Welby *v.* Welby, 2 V. & Bea. 196.

seised in fee simple, or of which any other person was seised in trust for him; with a proviso, that if his sons Henry and Audley (who were his first and second sons) should both of them die without issue male, in the lifetime of his son James, (who was his third son,) whereby the estate settled on his son Henry on his marriage should descend on his son James, that then his son James should not take any interest or estate in the lands thereinbefore devised to him. (*a*)

The question was, whether the reversion in fee of the lands which were settled on Henry should pass by this devise. The Court of King's Bench in Ireland gave judgment that the reversion in fee did pass; but this judgment was reversed by the Court of King's Bench in England; and Lord Mansfield, in delivering the opinion of the Court, observed, that the words used by the testator were certainly sufficient to carry the reversion in fee of the lands settled on Henry, if they had not been restrained by other words and expressions; and that the clause in the will, (besides several others,) which directed that in case Henry and Audley should die without issue male in the lifetime of his son James, whereby the estate settled on Henry should descend to James, then James should not take any estate in the lands devised to him, proved to a demonstration that the testator did not mean to devise this reversion; for if he had, then it could never go to James. A writ of error was brought in the House of Lords; and the Judges having given their opinion, that the reversion in fee did not pass by this devise, the judgment of the Court of King's Bench in England was affirmed. (*b*)

200* *131. A person, being seised in tail of an undivided fourth of an estate, and entitled to the reversion in fee of another fourth, expectant on the determination of an estate tail, reciting that she was entitled to an undivided fourth of an estate, &c., which she thought was an estate in fee, devised it to a trustee in fee, upon several trusts; and then came the following clause—"And all the rest, residue, and remainder of my estate and effects, I direct to be sold and disposed of, as soon as may be, after my decease, and thereout the expenses of my funeral to be paid," &c. (*c*)

(*a*) Strong *v.* Teat, 2 Burr. 912. (Kennon *v.* M'Roberts, 1 Wash. 96.)
(*b*) 3 Bro. Parl. Ca. 219.
(*c*) Roe *v.* Avis, 4 Term R. 605. Goodtitle *v.* Miles, 6 East, 494.

The Court of King's Bench held, that the reversion did not pass; for although those general words were sufficient to pass a fee, in order to answer the purposes of the will; yet in this case they said it was manifest that this estate was not in the contemplation of the testatrix when she made her will, it being only a reversion expectant on the determination of an estate tail, which her aunts might have barred; and the testatrix having by the former part of her will disposed of all the freehold estate to which she supposed herself entitled. They observed, that it was clear, from the purpose to which a part of the produce of what she directed to be sold was to be applied, namely, the paying of her funeral expenses, that she only meant to dispose of something which could be sold immediately; and that this reversion might never have descended to her heirs. †

132. It was *formerly* held, that *lands mortgaged* might be devised by the mortgagee, by the words, "*all my mortgages;*" but afterwards the Courts laid it down, that these words would only comprehend mortgages for years, and not mortgages in fee, especially if they were forfeited.

133. A person, seised of divers lands in A, B, and C, the lands in C being in him by mortgage, and forfeited, made his will; and after devising the lands in A and B to several persons and their heirs, he gave all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other *goods, whereof he was possessed, to his wife, *201 after his debts and legacies were paid; and made her his executrix. The Court doubted, whether the estate in mortgage passed to the wife, because the word "*mortgage*" was coupled with personal things; and because the testator used the words,—"*whereof he was possessed.*" (*a*)

*(*a*) Wilkinson *v.* Merryland, Cro. Car. 447.

[† In Church *v.* Mundy, Lord Eldon spoke of the above case of Roe *v.* Avis, with dissatisfaction. 15 Ves. 396, 403; 12 Ves. 432. In the former case the testator, being seised of the reversion in fee of lands expectant on an estate tail in his brother, devised all his real and personal estate to his wife for life, and if she should die, leaving no issue, then in trust for C. in fee, and in case C. should not be then living, to be at the disposal of the testator's wife. The testator had no other real estate. Lord Eldon, overruling the decision of Sir W. Grant, M. R., decided that the reversion passed.]

134. A person, who was seised of lands in fee, and of mortgages in fee, devised all his lands to A. B., and gave several legacies, and then said, "All the residue of my estate I give to my executor." It was resolved, that the mortgage went to the executor. But if the testator had only devised his lands, without giving any legacies, and had bequeathed the rest of his personal estate to his executors, there perhaps the mortgaged lands would have passed to A. B.; for else there would be nothing to answer and make sense of the clause, "all the residue;" for that implied that he had already devised some part of his personal estate; or at least it showed that he intended part of it should have passed. (*a*)

135. *This doctrine has been entirely altered;* for the nature of mortgages being now clearly ascertained and settled, and the whole transaction, till foreclosure, being considered a personal engagement only, in which the money borrowed is the principal, and the conveyance of the land only an accessary, it is established, that neither the general words, "*lands, tenements, and hereditaments,*" nor any other words, particularly appropriated to the description of real estates, will carry mortgages in fee, if the testator (the mortgagee) has other property to satisfy the words. (*b*)

136. A person, being seised of several freehold manors, and of a great personal estate, made his will, and after devising part to his wife for life, gave all other his lands, tenements, and hereditaments, out of settlement, to his nephew. The testator afterwards foreclosed and got releases of the equity of redemption of some mortgages in fee. One of the questions in this case was, whether these mortgages passed by the will under the words, "*lands, tenements, and hereditaments;*" and it was agreed by the Lord Chancellor, assisted by the Master of the Rolls, and two Judges, that mortgages in fee, although forfeited when the will was made, did not pass by those words. (*c*)

137. But if a testator has no other property answering the description given in his will, in point of situation, and
202* other circumstances, *except mortgages, they will then

(*a*) Winn *v.* Littleton, 1 Vern. 3.
(*b*) Tit. 15, c. 2. (Cogdell *v.* Cogdell, 3 Desau. 364.)
(*c*) Strode *v.* Russell, 2 Vern. 621. 1 Atk. 605.

pass by general words, though not particularly adapted to them, because otherwise the will would have no effect. (*a*)

138. A person, possessed of a mortgage of the Swan Inn, at Chelsea, made his will, and thereby devised to A, and his heirs, "all his freehold messuages and garden grounds at Chelsea." It was held by Lord Hardwicke, on a question whether the mortgaged interest would pass by this description, that as it did not appear the testator had any other lands there, it certainly would. (*b*)

139. [In Renvoize *v.* Cooper, the testator, after a general devise of all the residue of his real estates whatsoever and wheresoever to his wife her heirs and assigns, and after certain pecuniary legacies, added, "as to all the rest, residue, and remainder of his estates, book debts, bills, bonds, *mortgages*, and *other securities for money*," he bequeathed the same to his wife. The question was, whether mortgages in fee passed to the wife, or whether the heir at law was a necessary party to the conveyance of them. Sir John Leach, V. C., is reported to have given judgment in the following words; "It may be that the mortgaged fee will not pass to the wife, by the residuary devise of the freehold estate, because, having no mortgage for years, the subsequent gift of mortgages to the wife marks this testator's intention that it should not pass by that devise. But if this be so, I am of opinion, that the mortgaged fee will pass to the wife, by the subsequent gift of mortgages and other securities for money, though coupled with personal property. In substance, money, secured by a mortgagee in fee, is personal property, and a gift of a mortgage security for money, is a gift of all the testator's interest in the money and security, and will therefore pass the fee."] (*c*)

140. Various opinions have been entertained, within these few years, respecting the *question, whether a general devise passes lands whereof the devisor is only mortgagee or trustee.* In a case before Lord Rosslyn in 1800, it was contended that general words did not pass an estate held in trust for another, unless there appeared to be an intention that it should pass; to which

(*a*) 3 V. & Bea. 45. *Ante*, s. 98.

(*b*) Clarke *v.* Abbot, 2 Ab. Eq. 606. Woodhouse *v.* Meredith, 1 Mer. 450. Martin *v.* Mowlin, 2 Burr. 977, and 1 Dow, N. S. 13.

(*c*) 1 Mad. & Geld. 371. See also Mather *v.* Thomas, 10 Bing. 44.

his Lordship said, that was certainly the understanding; but perhaps the most convenient rule would have been the reverse, as it might be more easy to find a devisee than an heir.

203* * Lord Redesdale, who was then Attorney-General, suggested, as *amicus curiæ*, that the rule, that an estate held in trust should pass by a general devise, would not be the most convenient, from the frequent instances of estates tail created by general words, in consequence of which the legal estate might get into an infant, fettered with an entail. (*a*)

141. In a subsequent case, the Master of the Rolls, Sir W. Grant, having determined that an estate held in trust passed by the general words of a will; on an appeal to Lord Eldon, he said, "I am disposed in this cause to concur with the opinion of the Master of the Rolls, meaning rather to state my judgment that the rule is not, that in every case where general words are used, the property shall or shall not pass; but that in each case you must look at every part of the will for the intention with regard to such property. I do not know in experience any case, in which the proposition is laid down so strong, one way or the other, as it was laid down in the Attorney-General *v.* Buller. I know no case which states as the rule, that trust estates shall not pass, unless the intention that they should pass appears; and I incline to think they will pass, unless I can collect from expressions in the will, or purposes or objects of the testator, that he did not mean they should pass. In this case, there is no circumstance, except one, that I shall observe upon, denoting any special intention. It is the case of a dry trust, all the debts and legacies being long paid, as I now understand. There was therefore a pure legal estate in the testator, nothing remaining to be done but to re-convey. There is no one circumstance in this will to 'cut down the general effect, upon any notion of intention, unless it can be said, that where he meant to creat a trust, viz. as to the personal estate, he joins another person with his wife, giving the real estate to her alone; but that is too thin an evidence of intention, to afford much inference. (*b*)

The result is this: a will containing words large enough, and no expression in it authorizing a narrower construction than the

(*a*) 1 Inst. 205, a. n. Att.-Gen. *v.* Buller, 5 Ves. 339.

(*b*) Braybrooke *v.* Inskip, 8 Ves. 417. Roe *v.* Reade, 8 Term R. 118. 1 Sand. Uses, 296. ed. 3.

general legal construction, nor any such disposition of the estate as is unlikely for a testator to make, of any property not in the strictest sense his, as complicated limitations; nor any purpose at all inconsistent with as probable an intention to vest it in his wife as devisee, as to let it descend. I know of no case in which a mere devise in these general terms, without more, where the * question of intention cannot be embarrassed by any * 204 reasoning upon the purpose or objects, or the person of the devisee, has been held not to pass the trust estate. If there was any such case, I would abide by it; but I do not feel strong enough upon authority or reasoning to dissent from the decision of the Master of the Rolls.†[1]

142. Lands which are in mortgage, and whereof the devisor has only the *equity of redemption*, will pass by the same words

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[† Where, therefore, a general devise of real estates is for purposes applicable only to that which is the testator's absolute property, and inconsistent with ownership in another person, there trust and mortgage estates will not pass. Of this species of inconsistent disposition is a residuary devise of real estate charged with the payment of debts. Duke of Leeds *v.* Munday, 3 Ves. 348; Roe *v.* Reade, 8 T. R. 118; Ex parte Morgan, 10 Ves. 101; Attorney-General *v.* Vigor, 8 Ves. 273; Silvester *v.* Jarman, 10 Price, 78. Or where the real estate is devised in settlement; Thompson *v.* Grant, 4 Mad. 438; Galliers *v.* Moss, 9 B. & Cr. 267; In re Horsfall, 1 M'Clel. & Yo. 292; but a residuary devise of real estate to several as tenants in common in fee, was held not to be incompatible with an intention to pass the mortgage estate. Ex parte Whitacre. At the Rolls, July 22, 1807; 1 Sand. U. and T. 285. In Mather *v.* Thomas, 10 Bing. 44, the mortgaged estate was held to pass under the words *securities for money*, in a residuary devise to trustees; the trusts of the residuary disposition being to one for life, and after his decease to be divided unto and among his children. And in Wall *v.* Bright, 1 Jac. & W. 494, an estate which the testator had contracted to sell, was held by Sir T. Plumer, M. R., to pass under a general devise of real and personal estate to trustees in trust to sell. It was, however, admitted by the Court that a bare trust estate would not have passed by the devise in question; the purpose of conversion necessarily excluding from the general devise the intention of comprehending such an estate.]

[1] The power of a trustee, to devise trust estates, has been questioned of late. But in the recent case of Titley *v.* Wolstenholme, 7 Beav. 425, a devise of trust estates was sustained by Lord Langdale; who relied somewhat, however, upon the word *assigns*, in the limitation of the estate. See *ante*, tit. 12, ch. 2, § 9, note, and the authorities there cited. See also, Lindsell *v.* Thacher, 12 Sim. 178; Sharpe *v.* Sharpe, 12 Jur. 598; 17 Law J. 384, Chan.; Jackson *v.* Delancey, 13 Johns. 537, 554–559, where the cases are reviewed by Chancellor Kent.

But a devise of all real estate whatsoever, charged with £50, has been held not to carry a trust estate; Rackham *v.* Siddall, 12 Jur. 640.

as lands not mortgaged; because a mortgage is only considered as a pledge for securing the repayment of a debt, and the lands remain in the mortgagor, for every other purpose. (*a*)[1]

(*a*) Philips *v.* Hele, 1 Rep. in Cha. 101.

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[1] See, as to this point, *ante*, tit. 15, ch. 2, § 1, note.

CHAP. XI.

CONSTRUCTION—WHAT WORDS CREATE AN ESTATE IN FEE SIMPLE.

SECT. 2. *Words showing an Intention to give the whole Interest.*
18. *Words of Reference.*
20. *Effect of an Introductory Clause.*
25. *The word Estate.*
39. *Testamentary Estate.*
41. *All my Real Property.*
45. *Right, Title, and Interest.*
48. *All the Rest and Residue of my Estate.*
55. *Whatever else I have not disposed of.*
57. *Remainder and Reversion.*
SECT. 60. *Devise on Condition of paying a Sum of Money.*
65. *Or charged with Debts and Legacies.*
72. *Or with a perpetual Annual Payment.*
76. *Or for the Life of a Third Person.*
84. *A Devise with a Limitation over.*
88. *Devise to Trustees for Purposes requiring a Fee.*
92. *What words pass the whole Interest in a Chattel.*

SECTION 1. WITH respect to the *words* that are necessary to denote the nature of the estate or interest intended to be given by the testator to the devisee, the Courts, both of law and equity, in conformity to the general rules of construction already stated, do not require in a devise those legal and technical words which, in a deed, are deemed absolutely necessary to the creation of particular estates; but will *carry the intention of the testator into effect*, if sufficiently declared, however defective the language may be.[1]

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[1] It is abundantly settled, that in a devise, no technical words are necessary to convey a fee; but that the intention of the testator, as collected from the whole will, is to govern, unless contrary to law. The following are among the more recent cases, in which this rule is recognized and applied. Jackson *v.* Babcock, 12 Johns, 389; Baker *v.* Briggs, 12 Pick. 27; Spalding *v.* Huntington, 1 Day, 8; Fox *v.* Phelps, 17 Wend. 393; 20 Wend. 437; Johnson *v.* Johnson, 1 Munf. 549; Engle *v.* Burns, 5 Call, 463; Waring *v.* Middleton, 3 Desau. 249; Saunders *v.* Mathewson, 11 Conn. 149; Finlay *v.* King, 3 Pet. 346, 377; Doe *v.* Turner, 2 D. & R. 398; Morrison *v.* Semple, 6 Binn. 97, per Tilghman, C. J.; [Abbott *v.* The Essex Co. 18 How. U. S. 202; Deering *v.* Adams, 37 Maine, (2 Heath,) 264; Pratt *v.* Leadbetter, 38 Maine, (3 Heath,) 9; Fewell *v.* Fewell, 6 Rich. Eq. (S. C.) 138.]

2. Upon this principle it has been long established that the word "*heirs*" need not be used in a will to create an *estate in fee simple;* but that *any other words, sufficiently showing the intention* of a testator to give the whole of his interest in the lands to the devisee, will have the same effect. (*a*) [1]

3. Thus, it was resolved, so early as in the reign of King Edward III., that a devise to a man, *in perpetuum*, gave him
208* an *estate in fee. It is the same where the devise is to a person "*in fee simple.*" So of a devise to a man and "*his successors,*" that word being deemed equivalant to "*heirs,*" for *hæres succedit patri.* (*b*) [2]

4. It is said by Perkins, section 557, that if lands be devised to J. S. "*to hold to him and his assigns,*" he will take an estate in fee simple; but this is denied by Lord Coke, who says, if a devise be to a man and his assigns, without saying forever, the devisee has but an estate for life. (*c*)

5. Lord Coke also says, a devise to A, *et sanguini suo*, passes a fee, for the blood runs through the collateral, as well as the

(*a*) 1 P. Wms. 77. (*b*) Bro. Ab. Devise, pl. 33. 1 Inst. 9 b. 1 Rep. 85 b. (*c*) 1 Inst. 9 b.

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[1] In the States of *Maine, New Hampshire, Massachusetts, Vermont, Pennsylvania, North Carolina, South Carolina, Ohio, Michigan, Tennessee, Indiana, Missouri,* and *Mississippi,* it is provided, by statutes, that a devise, without any words of limitation, shall be understood to convey all the estate and interest which the testator had in the property devised, unless a different intention should be clearly manifest upon the face of the will. See Maine Rev. St. 1840, ch. 92, § 26; Mass. Rev. St. 1836, ch. 62, § 4; N. Hamp. Rev. St. 1842, ch. 156, § 4; Penn. Dunl. Dig. p. 572; N. Car. Rev. St. 1837, ch. 122, § 10; S. Car. St. at Large, Vol. VI. p. 237; Ohio, Rev. St. 1841, ch. 129, § 49; Mich. Rev. St. 1846, ch. 68, § 2; Tenn. C. & N. Dig. p. 707; Ind. Rev. St. 1843, ch. 30, § 5; Misso. Rev. St. 1845, ch. 36, § 47; Missi. Rev. St. 1840, ch. 34, § 23; Verm. Rev. St. 1839, ch. 45, § 3.

A similar rule exists, in regard to conveyances in general, in the statutes of *New York, Virginia, Kentucky, Georgia, Alabama,* and *Arkansas.* See *ante,* tit. 32, ch. 22, § 1, note.

And such is now the law in England, by Stat. 1 Vict. c. 26, § 28. [A testator devised to his "daughter and her legal heirs," certain real estate, but added an "express condition," that she should not dispose of the same, nor join her husband in any conveyance thereof, but that during her life it should remain inalienable. *Held,* that the daughter took an estate in fee, the restraint upon alienation being void. Walker *v.* Vincent, 19 Penn. (7 Harris,) 369. See also Culin's Appeal, 20 Ib. 243; Cook *v.* Walker, 15 Geo. 457.]

[2] Though the word "*heirs*" is unnecessary, in a will, yet, to give a fee, there must, at common law, be something more than a mere devise of the land. Franklin *v.* Harter, 7 Blackf. 488.

lineal line; but a devise to a man, *et semini suo*, only gives him an estate tail. (*a*)

6. The same author says, a devise to a person, "*to give and sell*," passes an estate in fee simple; and this doctrine has been confirmed by several determinations. Thus, where a person devised lands to A, "*to give, sell, and do therewith at his will and pleasure*," it was held that the devisee took an estate in fee simple.[1] And in another case, where a man devised lands to his wife, "*to dispose and employ them on her and his son, at her will and pleasure*," it was held, that she took an estate in fee. (*b*)

7. Where a person, seised of a house and lands, leased them for ninety-nine years, and then made his will, by which he devised to B. his house and all his lands for ninety-nine years, and then added these words:—"The said B. to have *all my inheritance*, if the law will allow," it was held, that B. took a fee. (*c*)

8. Where A, seised of lands in W., devised them to his son B for his life, "and then to remain to C, the son of B, except B purchased another house, with so much land as in W. for C, and then B should sell the lands in W. *as his own*." It was held that C took a fee in the lands in W., as B did not make any purchase of any other lands; for the word *purchase* imported, in common parlance, an absolute purchase in fee. (*d*)

9. A person devised in these words:—"I give my house in Broad-street to M. T., for her own use, *to give away* at her death to whom she pleases." Lord Hardwicke held, that an estate in fee passed. (*e*)

(*a*) Idem.

(*b*) Idem. (16 Johns. 588.) Bro. Ab. Devise, pl. 39. Moor, 57. (Doughty *v.* Brown, 4 Yeates, 179. Jackson *v.* Coleman, 2 Johns. 391. Den *v.* Humphreys, 1 Harr. 25. Moore *v.* Webb, 2 B. Monr. 282. Dice *v.* Sheffer, 3 W. & S. 419. Barnard *v.* Bailey, 2 Harr. 56. Culbertson *v.* Duly, 7 W. & S. 195. Shermer *v.* Shermer, 1 Wash. 343. Wythe, R. 6.)

(*c*) Widlake *v.* Harding, Hob. 2. S. C. Moor, 837. Godb. 207.

(*d*) Green *v.* Armsteed, Hob. 65. (Stoever *v.* Stoever, 9 S. & R. 434.)

(*e*) Timewell *v.* Perkins, 2 Atk. 102.

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[1] The rule is, that where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception is where the testator gives to the first taker an estate for life *only*, by certain and express words, and annexes to it a power of disposal. Jackson *v.* Robins, 16 Johns. 537, 588, per Kent, C.; Armstrong *v.* Armstrong, 3 Am. Law Journ. 49, N. S. See *infra*, ch. 13, § 5; [Haralson *v.* Redd, 15 Geo. 148; Cook *v.* Walker, Ib. 457.]

10. The words "*freely to be enjoyed,*" have been held to pass an estate in fee; as where, after an introductory clause, showing an intention to dispose of his whole estate, a person gave to his sons, T. M. and R. M. all his lands and tene-
209* ments, *"*freely to be enjoyed and possessed alike;*" it was held that a fee passed. But in a modern case, these words were not allowed to have so extensive an effect. (*a*) †[1]

11. In another modern case, it was held, that a devise to the testator's wife of "*all his property, both personal and real, forever,*" passed the fee in the real estate; and that the devisor's intent to use those words in a more restricted sénse, was not shown by a subsequent clause of the will, whereby he gave an additional annuity, after the decease of his wife, to a person to whom he had before given a smaller annuity, preceding the devise to the wife. (*b*)

12. A person devised to Agnes Pearson, who was his heir at law, for and during her life, "to be enjoyed by her without molestation, and after her death to her lawful issue, and if she should have no issue, that she should have *power to dispose thereof* at her will and pleasure." The Court was of opinion, that Agnes took an estate in fee simple, as the contingent remainder to the issue never vested; for the testator, by giving her power to dis-

(*a*) Loveacres *v.* Blight, Cowp. 352. Goodright *v.* Barron, 11 East, 220. (Willis *v.* Bucher, 3 Wash. 369.)

(*b*) Doe *v.* Roper, 11 East, 518. (Morrison *v.* Semple, 6 Binn. 94. Jackson *v.* Housel, 17 Johns. 281.)

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† [The case of Loveacres *v.* Blight is distinguishable from that of Goodright *v.* Barron, referred to by our author. In the former, the testator by his will charged the estate in question with an annuity to his wife for her life, and with as much woodcroft thereout as she might have need of; so that "freely to be enjoyed and possessed" could not, as Lord Mansfield observed, mean free from incumbrances, but must mean free from all limitations; that is, the absolute property in the estate. In Goodright *v.* Barron there was no charge upon the estate; and the expression "freely to be possessed and enjoyed," being ambiguous, might mean free from incumbrances; and, therefore, they were held not to furnish a sufficient indication of intention to take the case out of the general rule of construction, established by Denn *v.* Gaskin, and other cases, cited in a subsequent chapter. See also Oates *v.* Brydon, 3 Burr. 1895, as to the general rule.]

[1] See the comment of Mr. Just. Story on these two cases, in Wright *v.* Denn, 10 Wheat. 243, 244. See also Doe *v.* Roberts, 11 Ad. & El. 1000; *infra*, § 51, note; *post*, ch. 13, § 5, note.

pose thereof at her will and pleasure, in case she had no issue, had given her a fee simple. (*a*)

13. A devise "*for the benefit of children during their minority*," without any further disposition, has been held in some cases to give such children an estate in fee simple.

14. A person devised the *residue* of his real and personal *estate* to trustees, their heirs, executors, and administrators, "in trust to pay and apply the produce and interest thereof for the maintenance and benefit of such of his grandchildren by his only daughter N. as should be living at the time of his decease, until his said grandchildren should attain the age of twenty-one years or be married;" and made no further disposition of his *estate, but only directed that if all his trustees should *210 die, his son-in-law N., the husband of his daughter, should be a trustee. (*b*)

Lord Macclesfield said, the intention was most plain, that the grandchildren should have the surplus both of the real and personal estate, after the age of twenty-one, for it could not be imagined that the testator should show a concern for his grandchildren, when they did not want it, and leave off that care at the only time when they could be supposed to stand in need of it, namely, when they came of age, and were marriageable. Besides, it was plain the testator gave all from the heir at law, by vesting the whole estate in fee, as well as the legal property of the personal estate, in trustees; which would not have been done had anything been intended to remain to the daughter and heir; not only the interest but the produce of the real and personal estate was to be applied by such trustees; and to help this plain intention of the testator, the word *produce* should be taken in the larger sense, and then it would signify whatever the estate would yield, by sale or otherwise; and this case was the stronger, in regard the son-in-law was to be a trustee, in case the other trustees should all die; but it could not be intended that the son-in-law should be a trustee for himself, or for what himself would be entitled to, should it come to his wife.

It is reported in Atkyns, that Lord Hardwicke said, he could

(*a*) Goodtitle *v.* Otway, 2 Wils. 6. *Vide* Tomlinson *v.* Dighton, *infra*, c. 13.
(*b*) Newland *v.* Shephard, 2 P. Wms. 194.

see no reason to approve of this case. It has, however, been admitted as an authority in the following one. (*a*)

15. G. P. devised all the *rest, residue, and remainder* of his real and personal estate to two trustees, "*in trust for his younger son G., till he attained twenty-one, and then the trust was to cease.*" (*b*)

Lord Henly, after taking time for consideration, delivered his opinion, that G. was intended to have the whole beneficial interest in the residue of the real and personal estate; and that the trust was to continue only during his minority; that it was the same as if the testator had said,—"I give the estate to trustees, in trust for G. till he attain twenty-one, and then to G. and his heirs;" and that Shephard *v.* Newland was a much stronger case. (*c*)

16. A devise to trustees in fee, "*in trust for A. B.*" without any words of limitation, has been held to pass the whole beneficial interest, or fee simple, to A. B.

17. Upon a case sent out of Chancery, for the opinion
211* of the * Court of K. B., the facts were: A person had devised to trustees and their heirs a certain estate, in trust for Joan, the wife of John Pippet, and James her son; one moiety of the profits to be applied by the trustees to the separate use of the said Joan, and the other moiety to be laid up, or otherwise improved, till the said James should arrive at his age of twenty-one years. And his will was, that if the said Joan should die during the minority of the said James, the trustees should lay up the increase and profits of the mother's moiety, for the benefit of her son; and after the decease of the said Joan, should permit and suffer the said James to enter upon and enjoy the whole, as soon as he attained the age of twenty-one years. (*d*)

It was insisted, that James took only an estate for life, because no words of inheritance were added to the devise to him. That the argument drawn from the cases in Peere Williams and Ambler, that the beneficial interest which the devisee took was co-extensive with the legal interest devised to the trustees, was

(*a*) 3 Atk. 816. (*b*) Peat *v.* Powell, Amb. 387. 1 Eden, 479. *Supra*, ch. 10, s. 23.
(*c*) Doe *v.* Roper, 11 East, 518. Doe *v.* Clayton, 8 East, 141.
(*d*) Challenger *v.* Sheppard, 8 Term R. 597. (See 2 Pow. Dev. 407–409, by Jarman, where this case is commented on.)

untenable, because it tended to show, that in all cases, where an estate was given to trustees and their heirs, in trust, the *cestui que trust* must take a fee. But the estate of the *cestui que trust* was not to be measured by the estate devised to the trustees, and a contrary doctrine had at all times prevailed, namely, that the heir at law takes whatever is not expressly devised away from him.

It was said in reply, that it was not necessary to contend that the heir at law would take whatever was not devised away from him, because here the fee was expressly given to the trustees; and by that devise the testator had manifested his intention that the heir at law should not take. Then if the estate did not descend to the heir at law, the question was, to whom it was devised. And the two cases, cited from Peere Williams (*a*) and Ambler, showed, that the law had already put a construction on a will framed like the present, and had said that the *cestui que trust* should take a beneficial interest in the whole that was devised to the trustees.

The Court gave no opinion when the case was argued, but certified that John Pippet took a beneficial interest in fee.[1]

(*a*) (Newland *v.* Shephard, 2 P. Wms. 194. See 2 Pow. Dev. 409, by Jarman.)

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[1] An intention to give a fee simple has also been inferred from the words used, in the following cases. "To my wife one third part of *all my effects*, the improvements excepted. To my son James the *improvement* whereon I now live." Anon, 3 Dall. 477. A devise to A, "*and if he shall die without an heir*," then over. Lippett *v.* Hopkins, 1 Gall. 454. "*All my goods and effects, both real and personal.*" Ferguson *v.* Zepp, 4 Wash. 645. A devise to A, B and C, "*the longest liver to have all.*" Devenish *v.* Smith, 1 Har. & M'Hen. 148. That J. G. should "*have* his land." Guthrie *v.* Guthrie, 1 Call, 7. The word "*leasehold*," where the intent is clear. Saylor *v.* Kocher, 3 W. & S. 163. So, "*I give my lands.*" Smith *v.* Berry, 8 Ham. 365. (But see Wright *v.* Denn, 10 Wheat. 204.) So, I "give and bequeath *my share*" in certain lands. Paris *v.* Miller, 5 M. & S. 408. [So, "my part coming from the estate of my father." Peppard *v.* Deal, 9 Barr. 140.]

So, by a devise to trustees, in fee "*for the use and benefit* of A. B.," without words of limitation to the latter; it was held that A. B. took a beneficial interest in fee. 17 Law J. 400, Chan.; Bass *v.* Scott, 2 Leigh, 356. So, where a devise was to trustees in fee "upon trust for the *use and benefit* of my natural Mustee boys, R., B., C.," and others named in the will, without any words of limitation to the boys, it was held that they took the beneficial interest in fee. Meoro *v.* Cleghorn, 12 Jur. 591; in which the cases of Challenger *v.* Sheppard, 8 T. R. 597, and Knight *v.* Selby, 3 Man. & Gr. 92; 3 Scott, N. R. 409, were commented on and followed. So, a devise of *wild* lands, in

18. The quantity of estate intended to be given by a devise may be *described* either by *express words*, or by *reference to another devise* in the same will, or in any other instru-
212* ment. If *therefore a testator devises Blackacre to A and his heirs, and Whiteacre to B, to hold in the same manner as A holds Blackacre, B will take an estate in fee simple in Whiteacre. (*a*)

19. A person made his will in these words: "I devise to my eldest son and his heirs Blackacre for his part. *Item*, I devise to my second son, Whiteacre for his part." Adjudged, that the second son took a fee; because the words had a reference to the part of the eldest son. (*b*)

20. Where the *introductory clause*, prefixed to a devise, shows that the testator *intended to depart with his whole interest*, the subsequent words will, if possible, be construed so as to pass an

(*a*) Perk. s. 561. *Vide* c. 13 ss. 10 & 11.
(*b*) 1 Roll. Rep. 369. 3 Bulst. 127. [8 T. R. 597.]

Maine and Massachusetts, carries a fee. Russell *v.* Elden, 3 Shepl. 193; Sargent *v.* Towne, 10 Mass. 303. And see Caldwell *v.* Ferguson, 2 Yeates, 250. So, by a devise to his wife, of "half his plantation for life," and to one nephew "two thirds of the plantation except what was already willed to his wife," and the other third to another nephew, in the like words; it was held, that the nephews took remainders in fee. French *v.* M'Ilhenny, 2 Binn. 13. And see Dunlop *v.* Crawford, 2 McCord, Ch. 177. So, a devise of land, with a manifested expectation that the devisee should receive a title from the government, in his own name. Lindsay *v.* McCormack, 2 A. K. Marsh. 229. So, where the devise was "to my son C. *and his heirs*, the tract of land called A. Item. To my son C." (without limitation) "another parcel of land called B. Item. To my son C. *and his heirs* the tract of land called D.;" with a devise over, if he should die within age; it was held that he took a fee simple in the tract called B. Hoxton *v.* Gardiner, 1 Har. & M'Hen. 437.

Other cases of the like construction, upon the face of the will and its peculiar language, are, Packard *v.* Packard, 16 Pick. 191; Baker *v.* Bridge, 12 Pick. 27; Eliot *v.* Carter, 12 Pick. 436; Claflin *v.* Perry, 12 Mass. 425; M'Afee *v.* Gilmore, 4 N. Hamp. 391; Everts *v.* Chittendon, 2 Day, 338; Goodrich *v.* Lambert, 10 Conn. 448; Throop *v.* Williams, 5 Conn. 98; Den *v.* Gifford, 4 Halst. 46; Hill *v.* Hill, 5 G. & J. 87; Aspinall *v.* Andus, 7 Man. & Gr. 912; [Reifsnyder *v.* Hunter, 19 Penn. (7 Harris,) 41; Wood *v.* Hills, Ib. 513; Glenn *v.* Spry, 5 Md. 110.]

The word "*moiety*," which is generally accompanied by the word "*half-part*," as synonymous or explanatory of its force, carries with it the signification of the part or interest which the party takes in any subject-matter; so that when a man devises "*his moiety*," he devises his half-part or *interest* which he has in the thing devised. Therefore, a devise to B. of "*my moiety of the house he now lives in*," was held to give the devisee a fee simple. Doe *v.* Fawcett, 3 Man. Gr. & Sc. 274, 283.

estate in fee, and to prevent an intestacy as to any part of the testator's property.[1]

21. A *cestui que trust* in fee of a copyhold estate, made his will in these words: "*All the estate I have* I intend to settle in this manner, viz.: my estate at Kirby Hall I give to my dear brother, and after his decease my desire is that it should be disposed of to Mr. W. Tuffnell." (*a*)

Lord Hardwicke.—"I think the inheritance passes. All cases of this nature depend on the circumstances attending them; and in my opinion, the introductory clause of this will is decisive. He mentioned his intent to settle his estate, from whence it is plain that he proposed making an absolute disposition of the premises, which could not be, were the devisee to have but an estate for life."

22. A testator began his will in these words: "*As touching my worldly estate*, wherewith it has pleased God to bless me, I give, devise, and dispose of the same in the following manner." He then gave to his mother all his estate at N. with all his goods and chattels, as they then stood, for her natural life; and to his nephew T. D. after her death, if he would but change his name: if he did not, then he gave him only £20 a year, to be paid to him for his life, out of N. close and the farm held at R. which he gave her, upon his nephew's refusing to change his name, and to her and her heirs for ever. (*b*)

It was decreed by Lord Talbot that the nephew took an estate in fee, for the intent plainly appeared to pass the inheritance. The determination however in this case was not founded entirely on the force of the introductory clause.

23. [In the recent case of Wilce *v.* Wilce, the introductory * words expressing an intention to dispose of all * 213
the testator's worldly *property*, coupled with a residuary

(*a*) Tuffnell *v.* Page, MS. R. 2 Atk. 37. (Winchester *v.* Tilghman, 1 Har. & M'Hen. 452.)
(*b*) Ibbetson *v.* Beckwith, Forr. R. 157. (*Supra*, ch. 9, § 7. Kennon *v.* M'Roberts, 1 Wash. 96. Watson *v.* Powell, 3 Call, 265. Davies *v.* Miller, 1 Call, 127. Lambert *v.* Paine, 3 Cranch, 131.)

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[1] See *supra*, ch. 9, § 7, note. *Infra*, § 81. But such introductory clause will not carry an estate that is clearly omitted. Busby *v.* Busby, 1 Dall. 226; [Peppard *v.* Deal, 9 Barr. 140; Wood *v.* Hills, 19 Penn. (7 Harris, 513); McCullough *v.* Gilmore, 11 Ib. 370; Moon *v.* Moon, 2 Strobh. Eq. 327.]

disposition of all the rest of the testator's worldly goods, &c., "and every thing else he died possessed of," to his son George, were held to give him the fee in lands of the testator not specifically devised.] (*a*)

24. In some modern cases, the courts have refused, in the construction of a will, to connect the introductory clause with that which contained the devise. (*b*)†

25. As the word "*estate*" signifies the entire interest which the tenant has in a real hereditament, it follows that where a man grants "*all his estate*" in Dale to A and his heirs, every thing which he can grant will pass thereby; and it has long been established, by analogy from this principle, that in a will, the words "*all my estate*," pass a fee simple. (*c*)[1]

26. A person devised to his wife his "*whole estate*," paying debts and legacies. Adjudged, that the wife took a fee by the

(*a*) 7 Bing. 664.
(*b*) Frogmorton *v.* Holyday, *infra*, § 85. (Busby *v.* Busby, 1 Dall. 227.)
(*c*) Tit. 1, s. 8. 1 Inst. 345, a. Randall *v.* Tuchin, 6 Taunt. 410. [8 Ves. 604.]

[† Doe *v.* Buckner, 6 Term Rep. 610; 3 Ves. & B. 160, 164. In addition to the authorities cited by the author, the following may be added in which the word *estate* used in the introductory clause in the will, accompanied with the usual expression of intention to dispose of the testator's worldly estate was held of itself not sufficient to enlarge the subsequent devises in the will to a fee. Loveacres *v.* Blight, Cowp. 352–4; Denn *v.* Gaskin, ib. 657; Wright *v.* Russell, cited ib. 661; Doe *v.* Allen, 8 T. R. 497, 503; Goodright *v.* Barron, 11 East, 220; Doe *v.* Ravell, 2 Crom. & Jer. 617; Doe *v.* Gwillim, 5 Bar. & Adol. 122.]

[1] The word "*estate*" seems to have been principally or wholly relied on, in the following cases, as evincing the testator's intention to give a fee simple. Lambert *v.* Paine, 3 Cranch, 97; Campbell *v.* Carson, 12 S. & R. 54; Brown *v.* Wood, 17 Mass. 63; Jackson *v.* Merrill, 6 Johns. 185; Carr *v.* Jeannett, 2 M'Cord, 66; Davies *v.* Miller, 1 Call, 127; Butler *v.* Little, 3 Greenl. 239; Caldwell *v.* Ferguson, 2 Yeates, 250; Kellogg *v.* Blair, 6 Met. 322; Godfrey *v.* Humphrey, 18 Pick. 537; Allen *v.* Hoyt, 5 Met. 324; Josselyn *v.* Hutchinson, 8 Shepl. 339; Wilkinson *v.* Chapman, 3 Russ. 145; Whaley *v.* Jenkins, 3 Desau. 80; Hamilton *v.* Hodsdon, 11 Jur. 193; Doe *v.* Williams, 1 Exch. R. 414; 17 Law J. 51, Exch.; Jackson *v.* Babcock, 12 Johns. 389; Tracy *v.* Kilborn, 3 Cush. 557; [Leavitt *v.* Wooster, 14 N. H. 550; Pottow *v.* Fricker, 5 Eng. Law and Eq. Rep. 443.]

But the word "*estate*" does not always and of necessity include real property. See Saunderson *v.* Dobson, 1 Exch. R. 141; *Supra*, ch. 10, § 69, note.

[The word "estate" in a will, applied to real property, may express either the quantity of interest devised, or designate the thing devised, or both; and the sense in which it is used must be determined from the will itself. Hart *v.* White, 26 Vt. (3 Deane,) 260.]

force of the words, "*my whole estate*;" for they extended to his land, according to the common parlance, and also to all his estate in the land. (*a*)

27. A person, having copyhold estates which he had surrendered to the use of his will, devised in these words,—"*All other my estate, of what nature soever*, I give to my wife Joan, whom I make my executrix, to pay my debts and legacies therewith." Resolved, that the inheritance passed. (*b*)

28. In a case which has been already stated, it was held that the words, "*all other my estate, real and personal*," passed certain rents of which he was seised, and all his estate therein; for all his estate was a description of his fee. (*c*)

29. A person devised "*all her lands and estate in Upper Catesby with all their appurtenances*," to W. E. It was objected, that only an estate for life passed in these lands; for where a man devises his land and estate in such a place, it describes only the thing and not the interest in it; and the words in Upper Catesby *did nothing but point out the locality of the *214 thing; and lands and estate in this case were synonymous. (*d*)

Sir J. Jekyll said, the case of Bridgewater *v.* Bolton seemed to have settled the law in this point, it being a resolution given on great consideration, in which Lord Cowper, when of counsel, discouraged a writ of error in Parliament. And Lord Holt, who pronounced the judgment of the Court, laid it down as a rule, that a devise of all one's real estate, comprehended not only the thing, but also the interest in it. The word "*estate*" naturally signified the interest rather than the subject, and its primary signification referred thereto; and though the devise was of all her land and estate in Upper Catesby, this was not restrictive with respect to the *estate* intended to pass by the will, but only as to the land; as, if the testatrix had land in another parish, suppose for instance in Lower Catesby, those lands in Lower Catesby could not have passed by the will; and as the word "*estate*" has been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it, for then none could give

(*a*) Johnson *v.* Kerman, 1 Roll. Ab. 834.
(*b*) Lane *v.* Hawkins, 2 Show. 328.
(*c*) Bridgewater *v.* Bolton, c. 10.
(*d*) Barry *v.* Edgworth, 2 P. Wms. 523.

any opinion thereupon; and these words or the like were frequently made use of in wills; besides, the word "*estate*," if it did not pass a fee in the present case, would be quite void, since the devise of the lands did before of itself pass an estate for life; and no word in a will should be rejected, that could have any construction.

30. A person devised in the following words: "I give unto my wife, for so long as she shall live, *all that estate* I bought of Mr. Mead, with its apurtenances. *Item*, I give to my son Josiah Gale, part of that estate called Southfield, to him and his heirs for ever. *Item*, I give to my son Isaac Gale, the other part of that estate, to him and his heirs for ever; but if either of them shall die without issue, the survivor shall take the whole. *Item*, I give to my son Charles, all that estate I bought of Mr. Mead, after the death of my wife." The question was, what interest Charles took in Mead's estate. (*a*)

Lord Hardwicke.—"The first point is, whether an estate for life or in fee passed by the devise of that estate which he bought of Mead; and I am of opinion that it extends as well to a gift of the thing itself, as of his whole interest in it. So have been all the later determinations, upon the reason that men are *inopes consilii* when making their wills, which was the
215 * case *here: for this will, if not made by the testator himself, was certainly made by some very unskilful person. However, his intention appears to dispose of his whole estate among his children. In all the modern cases, where the word "*estate*" is used, it has been held to pass a fee, unless there be some words used to restrain that generality; for *estate* is *genus generalissimum*, as held by Lord Ch. J. Holt in the case of Bridgewater *v.* Bolton. It was objected, that there should have been the word *my*, but the want of it makes no difference, for the words, *all the estate* I *bought of Mead* are fully sufficient to carry as well the whole interest, as the thing itself. It was next objected, that where the testator gives but a life estate to his wife, he has used the very same words; but no argument can thence be drawn, that where he has not expressly given an estate for life, he did not mean to give a fee, but it rather turns the other way. He apprehended those words might give a fee, and has

(*a*) Bailis *v.* Gale, MS. Rep. 2 Vez. 48.

therefore restrained them, in his wife's case, to an estate for life; but adds no restraint where he meant to give them their full scope. But what weighs most in all those cases is, that the testator is making a division of his whole substance among his children, and, as I said before, presumed to be *inops consilii*, and his intent therefore shall be carried into execution. This case is stronger than that of Ibbetson *v.* Beckwith, whence arises another answer to the objection of his having the word "*estate*," as well where he makes a devise to his wife for life only, as in that in question; and shall therefore not be presumed to intend different interests, viz. the incorrectness of the will. This was given as an answer by Lord Talbot, and is equally so upon this will, which is also a very incorrect one." (*a*)

31. A person being seised in fee of a house and land at Braywick, in the county of Berks, devised the same in the words following:—"I give and bequeath to Mrs. Marten *my estate* at Braywick, Berks." It was contended that these words did not pass a fee, for want of the word *all;* but the Court held that the devisee took an estate in fee. (*b*)†

32. [The circumstance of the word "*estate*" being used in other parts of the will, in giving an estate for life merely, will not restrain its effect in other devises. Thus in the recent case of * Wilkinson *v.* Chapman, the testator gave all his *216 real estate, lands, and hereditaments, in P. to his daughter, her heirs and assigns, and if she should die under twenty-one, he gave his said estate, lands, and hereditaments, to his wife, for life, and after her decease he gave the said estate, lands, and hereditaments unto the children of S. H., to be equally divided amongst them as tenants in common. Lord Gifford, M. R., decided that the chidren of S. H. took the fee. (*c*)

33. Similar to the above, is the decision of the Court of C. B. in the later case of Gall *v.* Esdaile, overruling the decision of

(*a*) *Supra*, s. 22. *Infra*, § 81. Price *v.* Gibson, 2 Eden, 115.

(*b*) Holdfast *v.* Martin, 1 Term R. 411. [Roe *v.* Wright, 7 East, 259. Doe *v.* Clayton, 8 East, 141.] Chichester *v.* Oxendon, 4 Taunt. 176. Chorlton *v.* Taylor, 3 Ves. & B. 160.

(*c*) 3 Russ. 145. See also Randall *v.* Tuchin, 6 Taunt. 410. Roe *v.* Bacon, 4 M. & Sel. 366.

[† See also Harding *v.* Gardner, 1 Bro. & Bing. 72; 3 Moore, 365, which case seems to have overruled Pettiward *v.* Prescott, 7 Ves. 541.]

Sir John Leach, M. R. In that case, the devise was, "As to *the rest of my estate*, the two houses, one in St. John's Lane, and the other in Fogwell Court, in Charter-house Lane, I give to my wife Mary Mayer, for life; and after her decease, that in St. John's Lane, to my daughter M. M., the other between my sons John and Joseph, to be equally divided; it was decided, that the daughter took the fee in the house in St. John's Lane." (*a*)

34. These two cases last stated, and the authorities referred to in the margin, are distinguishable from Roe *v.* Blackett, it is presumed from the circumstance, that in the latter the word "*estate*" was expressly omitted in the devise over. (*b*)

35. In that case, the testator devised to his wife all freehold and leasehold houses, lands, and tenements, and *all his estate and interest therein for life*, and after her decease, he devised *his said messuages, houses, lands, and tenements*, to A, B, and C, as tenants in common; it was decided that the latter took only estates for life.

36. In some measure resembling the above, is the recent case of Doe *v.* Tucker, where the testator gave and bequeathed "*his freehold estate called P.*," to his wife, for life, after her death all the above bequeathed *lands, goods, and chattels*, to his sons Richard, Thomas, and Robert, share and share alike; the Court of K. B. held the sons took only life estates. (*c*)

37. In some instances, the operation of the word "*estate*" has been confined by the context.

38. Thus, where the testator gave "*all his estates in H., F., and M.*" to his nephew G. E., and other estates to other nephews, and in a subsequent part of the will expressed his intention to prevent waste by making his nephews tenants for life only.] (*d*)

217* *39. The words "*testamentary estate*" will also pass a fee simple, where there is an introductory clause indicating an intention to dispose of all the testator's property, [or contains a gift of a nominal sum to the heir.] (*e*)

(*a*) 8 Bing. 323. 1 R. & Myl. 540. Uthwatt *v.* Bryant, 6 Taunt. 317.
(*b*) Cowper, 235.
(*c*) 3 B. & Adol. 473. (*d*) Bruce *v.* Bainbridge, 2 Bro. & Bing. 128.
(*e*) Smith *v.* Coffin, 2 H. Black. 444. Doe *v.* Gilbert, 3 Bro. & Bing. 85. [Bradford *v.* Belfield, 2 Sim. 264.]

40. But where the word "*estate*" is used only for the purpose of describing the local situation of the lands devised, it will not have the effect of passing an estate in fee simple, as will be shown in a subsequent chapter. (*a*)

41. It has been decided, in a late case, that the words "*all my real property*" will carry an estate in fee simple.[1]

42. A copyholder devised his estate in these words: "I do will and bequeath *all my real and personal property* to my wife." (*b*)

Sir W. Grant said, that in the absence of direct authorities upon the subject, he thought the testator must be considered to have intended to pass his whole interest, as he did not see how a man could be said to give all his property, unless all his interest in it passed. It seemed in many cases that the Judges had explained the meaning of the word "*estate*," by saying that it imported the absolute property.

43. [The word "*property*," is of the same import as "*estate*,"[2] and although it is sufficient to pass the fee, yet like the word "*estate*," it may be restricted in its operation by the context.

44. Thus, in the recent case of Doe *v.* Clarke the word "*property*" was construed in a restricted sense, in reference to local situation; the testator in that case, after charging such part of his property as might be necessary for the payment of his debts, gave to his brother R. C. all that dwelling-house, &c., with all lands appertaining to the same, lately in the possession of G. S., of W., or his mortgagee, the said *property* lying and being in the township of W.; the Court of Exchequer held that R. C. took only a life estate in the premises in W.] (*c*)

45. A devise of all a person's "*right, title and interest*" in a house will pass an estate in fee simple in it.

46. Thus, where a woman, being tenant for life of a house, with the remainder in tail to her son, and the reversion in fee in

(*a*) Ch. 13, ss. 38 and 40, and note a.

(*b*) Nicholls *v.* Butcher, 18 Ves. 193. [See also, Doe *v.* Roper, 11 East, 518. Doe *v.* Langlands, 14 East, 370. Roe *v.* Pattison, 16 East, 221. Sharp *v.* Sharp, 6 Bing. 630.]

(*c*) 1 Cro. & Mee. 39. (Billing *v.* Billing, 5 Sim. 232.)

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[1] So, a devise of "*all my landed property*," gives a fee. Fogg *v.* Clark, 1 N. Hamp. 163; [Foster *v.* Stewart, 18 Penn. State R. (6 Harris,) 23.]

[2] See Jackson *v.* Housel, 17 Johns. 281; Mayo *v.* Carrington, 4 Call, 472.

herself, devised "*all her right, title, and interest*" in the house to her son. It was held by the Court of K. B., contrary to the opinion of Holt, that the son took an estate in fee simple,
218 * which * was affirmed by the House of Lords. The decision was however founded on the circumstance, that the son having already an estate tail in the house, if he took no more by the will than an estate for life, he had really nothing given. But in a modern case, the words, all his "part, share and interest," were held to pass a fee. (*a*)†

47. A person devised "*all his part, share, and interest*" of and in the estates of T. C. unto his sister for life; and from and after her decease he gave the same to J. S. (*b*)

Lord Kenyon held, that these words passed an estate in fee to J. S.; and said there was no doubt but that the word *interest* would pass a fee.

48. The words, "*all the rest and residue of my real and personal estate*," have been, in most cases, deemed sufficient to pass an estate in fee simple.[1]‡

49. A devised £50 to his heir at law, and then gave "*all the rest and residue of his real and personal estate*" to his wife. It was decreed, that the wife took an estate in fee simple in the real estate of the testator. (*c*)

50. A will was made thus:—"As to *all my temporal estate* with which it has pleased God to bless me, I dispose of the same as follows." Then there were several bequests, and then came these words: "And *all the rest of my estate*, goods, and chattels

(*a*) Cole *v.* Rawlinson, 3 Bro. Parl. Ca. 7. (1 Salk. 233. 2 Ld. Raym. 831, S. C.) 1 Salk. 234. [See also Sharp *v.* Sharp, *ubi sup.*] (*b*) Andrew *v.* Southouse, 5 Term R. 292.
(*c*) Murray *v.* Wise, Prec. in Cha. 264. 2 Vern. 690. [Forr. 284.]

[†A devise of "my *share* of the B. and other estates at, &c." (the testatrix being seised of an undivided fifth of the estates at B.) was held to pass a fee. Paris *v.* Miller, 5 M. & S. 408.—*Note to former edition.* Also 5 T. R. 292.]

[‡ But may be qualified by the will's context. See Doe *v.* Hurrell, 5 Bar. & Ald. 18.]

[1] This rule has been applied in the following cases, in which an intent to dispose of the residue was apparent, though variously expressed. Doe *v.* Pedley, 2 Gale, 106; Davenport *v.* Coltman, 9 M. & W. 481; Pitman *v.* Stephens, 13 East, 505; Carr *v.* Porter, 1 M'Cord, Ch. R. 60; Farmer *v.* Francis, 2 Sim. & Stu. 505; Parker *v.* Parker, 5 Met. 134; Kennon *v.* M'Roberts, 1 Wash. 96; Fraser *v.* Hamilton, 2 Desau. 578; [Forsaith *v.* Clark, 1 Foster, (N. H.) 409; Armstrong *v.* Kent, 2 Halst. Ch. R. 559, 637; Donnovan *v.* Donnovan, 4 Harring. 177.]

whatsoever, real and personal, I give to my beloved wife." Adjudged, that the words in this will were the same as if the testator had said, "I devise the rest and residue of my temporal estate;" which therefore passed a fee simple. (*a*)

51. In the case of Shaw *v.* Bull, Lord Ch. J. Trevor said,—"In the construction of wills generally, the words, '*my estate*,' '*the residue of my estate*,' or '*the overplus of my estate*,' may well pass an inheritance, where the intent is apparent to pass it.[1] But such intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the will, and circumstances of the case; for if the words be indifferent to real and personal estate, or may be applied to personal *alone, there the heir at law is not to be disinherited by the implication of such words, or by any implication at all, but what is a necessary one." (*b*) *219

52. A testator, taking notice of a jointure he had made, of one moiety of an estate, upon his wife, gave her the other moiety for life, for her better support and maintenance; and also gave her a house and parcel of land for her life; then he gave several other estates to his relations for life, remainder in tail, remainder in fee; and then devised in the following words: "*All the rest, residue, and remainder of my goods and chattels, and personal estate, together with my real estate not hereinbefore devised, bequeathed or disposed of*, I give, devise, and bequeath to my wife." (*c*)

The testator had an advowson and wharf which were not devised at all; and the question was, whether the fee of the advowson and wharf, and the reversion of the particular estate expressly given to the wife for her life, passed to her, by the residuary clause.

Lord Hardwicke.—"The estates not mentioned in the will clearly pass by the residuary devise, the word '*estate*' importing a fee, and therefore the fee of those estates is well devised by the

(*a*) Tanner *v.* Wise, 3 P. Wms. 295. Cliffe *v.* Gibbons, 2 Ld. Raym. 1324. [1 Vez. 10.]
(*b*) 12 Mod. 596. (*c*) Ridout *v.* Payne, MS. Rep. 1 Vez. 10. 3 Atk. 486.

[1] An *entire will*, in these words,—"I give and bequeath to my wife all my lands, messuages and tenements, by her *freely to be possessed and enjoyed*, with all my property whatsoever,"—was held to pass a fee. Doe *v.* Roberts, 11 Ad. & El. 1000. And see *supra*, § 10; Wright *v.* Denn, 10 Wheat. 243, 244.

residuary clause. As to the parcels devised to the wife for life, I am also of opinion, that the fee of the reversion passes by the residuary clause; and that the fee of the estates, particularly given before by the same will, passes by these words, appears from Allen, 28, 2 Vent. 285, and 3 Mod. 228. The only question then is, whether there be any particular circumstances to take this case out of the general rule; and two things have been insisted on, viz. the recital in the devise of the moiety, that the testator intended no more than a provision for life; but plainly that was not his intent, for he has given his wife his personal estate, not for life, but absolutely; and it is as clear that the real estate, not particularly taken notice of, passes likewise to her in fee. It is therefore inferring too much from this recital, that he meant to give her nothing but for life, since he might as well intend to give her the absolute property, for her better maintenance. The second thing insisted on is, that here are particular devises of some estates to the wife, and that the residuary devise being to the same person, it would be inconsistent to make the testator give her the same estate, first
220 * for * life, then absolutely; the general run of authorities being where the devisee for life and the residuary devisee are not the same, but different persons. But I think this will not avail: it is too much to say, that where a limited interest is given in one part of the will, and a general one in another, that the devisee must be confined to the particular interest; though I will not say how it would be, if absolute negative words were used: as, for life only. The law supposes that a man may vary his intent, even while he is writing his will, which frequently happens. But there is a particular argument furnished from this will, in support of this construction, for here are remainders limited over in fee of other estates given by the will, which shows that where the inheritance was meant to be absolutely disposed of, from the wife, it is done so by the will; and that what the testator intended to give his heirs, is taken by way of exception out of the inheritance."

53. A person begun his will thus: "As to *all my temporal estate*, wherewith it hath pleased God to bless me, I give and devise the same as follows." Then he gave several legacies to A, and directed him to sell all or any part of his real and personal

estate, for the payment of his debts and legacies; and concluded his will with this residuary devise: "As to all the rest of my goods and chattels, real and personal, movable and immovable, as houses, gardens, tenements, my share in the copperas works, &c., I give to the said A;" without using the word "*estate*" or any words of limitation whatever. Lord Hardwicke doubted at first, but was afterwards clearly of opinion, as the testator had a fee, that A took a fee. (*a*)

54. A person seised of shares in the corn market of the city of London, devised to his nephew the income of his shares in the corn market, for his natural life; and "*all the rest of his estates*," with all moneys in the stocks, &c., to be divided into equal shares, to Eliz. Snow and four other persons, share and share alike. It was resolved, that the last clause comprehended the reversion of the shares in the corn market, and carried the absolute inheritance in them to Eliz. Snow and the other devisees. (*b*)

55. The words, "*whatever else I have not disposed of*," or any other words of a similar import, will pass an estate in fee simple.

56. Thus, where a person devised his manor of B. to A and his heirs; and then proceeded thus:—"*Item*, I devise all my *lands, tenements, and hereditaments, to the said A. *221 *Item*, I devise all my goods and chattels, money and debts, and *whatever else I have not before disposed of*, to the said A, he paying my debts and legacies." (*c*)

Lord Ch. J. Trevor held, that under the concluding clause, *whatever he had not disposed of*, an estate in fee passed.

57. The word "*remainder*," or "*reversion*," after a disposition of a particular estate, will pass an estate in fee simple.

58. A person devised to his sister, and after her decease, "*the whole remainder*" of his lands to his brother, if he survived her. Adjudged, that these words could not extend to the quantity of the land, but to the quantity of estate in the land; for the whole land was given to the sister for life, so there could be no remainder of that; therefore it must be the remainder of the estate in the land, and by consequence a fee simple passed. (*d*)

(*a*) Grayson *v.* Atkinson, 1 Wils. R. 333.

(*b*) Fletcher *v.* Smiton, 2 Term R. 656. Hogan *v.* Jackson, *ante*, c. 10, § 84.

(*c*) Hopewell *v.* Ackland, 1 Salk. 239. 1 Com. R. 164. [See also Wilce *v.* Wilce, *ubi sup.* § 23.]

(*d*) Norton *v.* Ladd, 1 Lutw. fo. 755. (Annable *v.* Patch, 3 Pick. 360. Cruger *v.* Hayward, 2 Desaus. 422.)

59. A person devised in these words:—"Also I give to my son Charles *the reversion* of those two tenements now in the possession of J. C.; also I give him *the reversion* of the tenements my sister T. now lives in, after her decease." (*a*)

Lord Hardwicke said:—"As to the word '*reversion*,' I am also of opinion that it passes the whole interest. A reversion is a right of having the estate back again; and I think that according to Norton *v.* Ladd, where the devise was of a remainder, this is a good devise of the fee, unless there had been words to restrain it. How can the testator be thought to have given but a life estate herein to his child, when possibly the life of the particular tenant might have lasted longer than that of the child, and so the child have taken nothing at all? This proves he meant to give him a fee." (*b*)

60. It has been a long established rule, in the construction of wills, that if a person devises land, *with a direction that the devisee shall pay a gross sum out of it*, the devisee will take an estate in fee simple, without any other words; though the sum directed to be paid should not amount even to a year's rent of the land. This construction is founded on the principle that a devise of land shall in all cases be intended for the benefit of the devisee; now if a devisee was, in cases of this kind, only to take an estate for life, he might die before he received from the land the gross sum he had paid, and consequently be a loser by the devise. (*c*) [1]

222 * *61. T. W. devised copyhold lands, of the nature of borough English, to his eldest son; paying 40*s.* to each of his brothers and his sisters. Adjudged that he took a fee. (*d*)

(*a*) Bailis *v.* Gale, 2 Vez. 48, MS. Rep.

(*b*) *Ante*, § 58. Peiton *v.* Banks, 1 Vern. 65, *contra*.

(*c*) 1 Inst. 9 b. Doe *v.* Fyldes, Cowp. R. 841. (Willis *v.* Bucher, 2 Binn. 455. Lithgow *v.* Kavenagh, 9 Mass. 165.) (*d*) Wellock *v.* Hamond, Cro. Eliz. 204. 3 Rep. 20 b.

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[1] A devise to one, on condition that he convey other lands, of his own, to a third person, gives the devisee a fee simple on his performance of the condition. Gibson *v.* Horton, 5 H. & J. 177.

But in the case of a devise for life, charged with the payment of a sum of money, or other duty, the question, whether it shall be enlarged into a fee, is materially affected by the question whether the charge is absolute, falling upon the devisee at all events, or is contingent and uncertain, as, for example, payable out of the income only. In the former case, the devisee will take a fee; in the latter, he will not. Jackson *v.* Harris, 8 Johns. 141; *Infra*, § 68, note; and ch. 13, § 28.

62. A testator devised lands to his brother, paying to one person 20*s.*, and to others small sums, amounting to 45*s.* in all. The land was of the value of £3 per annum. Adjudged that the brother took an estate in fee. (*a*)

63. A person devised all his estates to A, paying £40 a-piece to his sisters. Adjudged a fee simple. And it appearing that the personal estate was not sufficient to satisfy legacies, it must consequently be intended his real estate. Besides, the devisee was not executor, and therefore it could not be intended of the personal estate. (*b*)

64. A, by his will, devised lands to B, and then bequeathed legacies; and gave £5 to C, and directed B to pay it, but gave him two years for that purpose. The jury found the land to be worth fifty shillings a year. It was adjudged that B took a fee; for the devise was of a sum in gross, and *debitum in præsenti solvendum in futuro.* Besides, it was a sum certain, to be paid to B at all events, whether the land yielded full five pounds or not; and so not like the cases where the sum devised was to arise out of the profits. (*c*)

65. A devise of lands *charged with the payment of debts and legacies*, will, for the same reason, pass an estate in fee simple.[1]

66. A person devised to his brother, Richard, all his lands, tenements, and hereditaments, and whatever else he had in the world; and made him executor; desiring him to pay his debts and legacies. Adjudged, on a special verdict, that the devisee took an estate in fee. (*d*)

67. A, seised in fee of lands, made his will, and gave his cousin B £20, to be paid out of his lands within one year: and after other legacies, he gave all his lands to Richard, generally. Adjudged, that Richard took an estate in fee. (*e*)

68. A will was made in these words,—" All the rest, residue, and remainder, of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, *my legacies and funeral expenses being thereout paid;* I give, devise, and

(*a*) Collier's case, 6 Rep. 16. [Moone *v.* Heaseman, Willes, 140.]
(*b*) Moore *v.* Price, 3 Keb. 49.
(*c*) Reeves *v.* Gower, 11 Mod. 208.
(*d*) Ackland *v.* Ackland, 3 Vern. 687.
(*e*) Freak *v.* Lee, 2 Show. R. 38.

[1] [Bell *v.* Scammon, 15 N. H. 381.]

bequeath unto my sister J. D., and constitute and appoint her my executrix and residuary legatee, of this my will." (*a*)

Lord Kenyon said, that the first words alone were not
223* sufficient *in law to carry a fee; but that he relied on the words immediately following, "my legacies and funeral expenses being thereout paid," as sufficient for that purpose; for the fund which was to answer those demands, ought to be as ample as possible. Those charges extended to, and were to be taken out of, the property which was before given to the residuary legatee; and if that devise did not comprise the whole of the devisor's estate, the interest as well as the land, the legacies and funeral expenses might not be paid.† [1]

(*a*) Doe *v.* Richards, 3 Term R. 356.

[† The authority of the case of Doe *v.* Richards seems to be considerably shaken, if not overruled by the much litigated case of Denn *v.* Mellor, 5 T. R. 558; (2 B. & P. 247;) *infra*, ch. 13, s. 33, between which and the above case, it is not easy to discover any substantial distinction. In Doe *v.* Richards the charge cannot well be considered as thrown upon the *devisee*, but on the *land*. Macdonald, C. B., in Denn *v.* Mellor, considers that case as overturning the decision of Doe *v.* Richards; and Lord Ellenborough, in Doe *v.* Snelling, 5 East, 93, observes: "The doctrine and principle of the case of Doe *v.* Richards is right, though perhaps the words to which it was applied, will hardly sustain the application, as was considered by many of the Judges, on the decision of the case of Denn *v.* Mellor, in the House of Lords. That was a devise of lands, the legacies and funeral expenses being thereout paid; and those words were holden to carry the fee, being considered the same as if the devisor had said, being *by him*, (the devisee,) thereout paid. And if those words had been added, the application of the doctrine would unquestionably have been right." See also 2 New Rep. 349, per Sir James Mansfield; Doe dem. Thorn *v.* Phillips, 3 Bar. & Ad. 753.]

[1] The principle, on which Doe *v.* Richards was decided, was distinctly recognized in Wright *v.* Denn, 10 Wheat. 231; and the propriety of its application, to a devise in similar terms, seems fully sanctioned by the subsequent case of Doe *v.* Phillips, 3 Barn. & Adol. 753.

The general doctrine is thus stated by Chancellor Kent: "Another general rule is, that if the testator creates a charge upon the *devisee* personally, in respect of the estate devised, as, if he devises lands to B, on condition of his paying such a legacy, the devisee takes the estate on that condition; and he will take a fee by implication, though there be no words of limitation, on the principle that he might otherwise be a loser. But where the *charge is upon the estate*, and there are no words of limitation as a devise to A of his lands, after the debts and legacies are paid, the devisee takes only an estate for life. Jackson *v.* Bull, 10 Johns. Rep. 148; Jackson *v.* Martin, 18 Johns. 35; Spraker *v.* Van Alstyne, 18 Wendell, 200; Harris *v.* Fly, 7 Paige, 421; M'Lellan *v.* Turner, 15 Maine Rep. 436; Gibson *v.* Horton, 5 Harr. & Johns. 177; Beall *v.* Holmes, 6 Harr. & Johns. 208; Lithgow *v.* Kavenagh, 9 Mass. Rep. 161; Story, J., 10 Wheat. Rep. 231; 3 Mason's Rep. 209–212; Denn *v.* Mellor, 5 Term R. 558; Goodtitle *v.* Maddern,

69. A person devised in these words,—"I give and bequeath my freehold house with the appurtenances, &c., and all furniture thereto belonging, to E. G., whom I make executrix of this my last will; she paying all my just debts and funeral expenses, and legacies before mentioned, twelve months after my death. I likewise leave to the said E. G. all the rest and residue of my personal estate." (*a*)

The Judge before whom the cause was tried being of opinion that the devisee took a fee, by reason of the words, "she paying all my debts," nonsuited the plaintiff.

On a motion to set aside that nonsuit, Lord Kenyon said:—"I am clearly of opinion, that the direction given at the trial was perfectly right. In cases of this kind, the question has always been, whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case, the devisee only takes an estate for life, but in the latter he takes a fee, otherwise he might be a loser by the devise. Here the devisee is bound to *pay the debts and legacies at all events; and *224 the charge is thrown on her in respect of the real estate. The personalty is given to her by the next clause in the will."

70. A person devised in these words,—"All the rest I have in the world, both houses, lands, goods and chattels, stock in trade, and all other things that belong or may belong to me, I give to my present wife, J. P., my executrix; so that she shall sell my stock in trade and household goods, and if these will not pay the debts, she shall sell next the house of fee in Penzance, and not Prospednick; so that my executrix shall pay in good time all lawful debts." (*b*)

Lord Ellenborough said, it was clear that the executrix and residuary legatee took a fee in the premises in question; for she was charged with payment of all the debts, and she had the

(*a*) Doe *v.* Holmes, 8 Term R. 1. (*b*) Goodtitle *v.* Maddern, 4 East, 496.

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4 East's Rep. 496; Preston on Estates, Vol. II. 207, 217–220, 228, 235, 243–250." See 6 Kent, Comm. 540; 2 Pow. on Dev. 379–395, by Jarman; 2 Jarm. on Wills, 171–175, by Perkins, and cases there cited; Burlingham *v.* Belding, 21 Wend. 463; Dewitt *v.* Eldred, 4 W. & S. 414; Franklin *v.* Harter, 7 Blackf. 488; [Olmstead *v.* Olmstead, 4 Comst. 56; Harden *v.* Hays, 9 Barr. 151; Coane *v.* Parmentier, 10 Barr. 72.]

land devised to her, as well as the personal estate, all in the same clause, in order to enable her to satisfy that charge; and she could not have less than a fee in it, because she was empowered to sell it, which she could not do without having the fee: as to what was said in the will, relative to the sale of the stock in trade, and household goods, in the first instance, for payment of debts, and if those were not sufficient, then the house in Penzance, that was merely directory to her, to apply the personalty first for payment of debts, before the realty, which was no more than what the law directs in the common case. The distinction turned in all the cases on this, whether the debts, &c. were merely a charge on the estate devised, or a charge on the devisee himself, in respect of such estate in his hands. (*a*)

Judgment, that the devisee took an estate in fee.

71. The cases, where the payment of debts and legacies is charged on the estate devised, and not on the devise, will be stated in the thirteenth chapter.

72. Where lands are devised, with a direction that *the devisee shall make a perpetual annual payment thereout*, the devisee will take an estate in fee simple; for otherwise he could not fulfil the intention of the testator.

73. A devised lands to C, a younger son, and willed that C should pay annually to his eldest son B, and his heirs, £3. Resolved, that this was an estate in fee. (*b*)

74. Lands were devised to I. and S., and they were to pay yearly to the merchant tailors of London, £6 10*s*. It was
225* resolved *that the devisees took a fee simple, by reason of the annual payment, without any regard to the greatness or smallness of the sum: as the charge continued forever, the estate must continue so too; for without the estate the charge could not be. (*c*)

75. A person devised four coats to four boys of the parish of D. forever, and all his lands, tenements, and hereditaments, and all his personal estate to his wife, and her assigns. Adjudged, that the wife had a fee simple, because she took the lands with a perpetual charge. (*d*)

(*a*) Doe *v.* Snelling, 5 East, 87. (*b*) Shailard *v.* Baker, Cro. Eliz. 744.
(*c*) Webb *v.* Hearing, Cro. Jac. 415.
(*d*) Smith *v.* Tyndall, 2 Salk. 685. 11 Mod. 102.

76. A devise *upon condition of paying an annual sum* to a third person, *during the life of such third person*, will give the devisee an estate in fee simple; for otherwise the annuity might cease before the death of the person to whom it was given.

77. A person devised lands to A. B. conditionally, that he should allow to his son Nicholas, meat, drink, &c. during his natural life. It was argued, that this was a fee simple; for Nicholas had no manner of provision else; it was plain the testator designed the maintenance to be for Nicholas's life; and not that when A. B. should die, Nicholas should starve; therefore it was clear that A. B. must have a larger estate than for his own life, for otherwise, instead of having a benefit by the will, he would be prejudiced by it, if he should perform the testator's will. Adjudged that A. B. took an estate in fee simple. (*a*)

78. A person devised two houses to his son Robert, upon condition that he should pay unto his two sisters £5 a year, with a clause of entry for non-payment. (*b*)

The Court was of opinion, that a legacy or devise was always for the benefit of the party; so that it was reasonable to make such construction of the will, that he might have no possibility of a loss; for if there was a devise to one, upon condition that he paid a sum of money, if there was a possibility of a loss, though not very probable, it should be construed a fee; and therefore the estate in this case being limited to Robert, and charged with payments to the sisters, during their lives, plainly proved the intent of the testator, that the devisee should have an estate in fee simple. Judgment was given accordingly.

79. T. Ives devised a house to Clement Boreham for his life, paying thereout 40*s.* a year to Robert Boreham, the testator's *grandson; and gave two copyhold tenements to *226
Sarah Boreham, she paying *thereout* 40*s.* a year to her sister Elizabeth. (*c*)

The question was, what estate Sarah Boreham took. It was admitted, that if this was an annuity for life to Elizabeth, it would make it a devise in fee to Sarah; and as this could not be effectuated without construing the inheritance to be given to Sarah, it raised a violent presumption that the testator intended

(*a*) Lee *v.* Stephens, 2 Show. 49. (*b*) Reed *v.* Hatton, 2 Mod. 25.
(*c*) Baddeley *v.* Leppingwell, 3 Burr. 1533. Wilmot, 223.

her an estate of inheritance. The Court was of opinion, that Sarah took an estate in fee.

80. A person, having a copyhold estate, after giving several legacies, gave to Mary Ramsey 20*s.* a year for her life, to be paid by his executors. He also gave to his kinsman T. Allin all his two yard-lands, with his house and homestead; and all the residue and remainder of his goods, chattels, debts, mortgages, leases and personal estate, he gave to the said T. Allin, he paying his debts, legacies, and funeral expenses; and made the said Allin executor. The question was, whether the devise to T. Allin was for life or in fee. (*a*)

Lord Ch. J. De Grey said, he thought the real estate devised to Allin was in fee simple; and that upon two grounds. I. By implication; not indeed a necessary implication, strictly speaking, but so far necessary as it clearly arose from the reasonable construction of the will. The annuity was given to Mary Ramsey for her natural life, to be paid by his executor; which being of an uncertain duration, must have an estate in fee to support it. II. All the several devises to Allin followed each other immediately, and must therefore be construed as one clause; so that the payment of debts and legacies was charged on the real, as well as the personal estate. The other Judges concurred.

81. A testator began thus,—"As touching all such temporal estate," &c., and then devised a house to his grandson, paying yearly and every year out of the said dwelling-house, the sum of 15*s.* to his granddaughter. (*b*)

Lord Kenyon. —"Though the general introductory words used in this will would have some effect in the construction of the subsequent devises, as was said by Lord Talbot in a case before him; they would not of themselves carry a fee. But it has been very properly admitted, that the words, *paying yearly and every year*, are sufficient for that purpose. That annuity 227* was intended *to continue during the granddaughter's life, though it is not so expressly mentioned; and therefore of necessity the grandson must take an estate in fee." Judgment was given accordingly. (*c*)

(*a*) Goodright *v.* Allin, 2 Black. R. 1041.
(*b*) Goodright *v.* Stocker, 5 Term R. 13.
(*c*) Ibbetson *v.* Beckwith, *ante*, § 22.

82. The following case was sent out of Chancery, for the opinion of the Court of King's Bench. A person devised certain estates to her sister for life, and after her decease, she gave the same to E. Southouse, charged with the payment of an annuity of £20 to J. T. for and during the term of his natural life. (*a*) †

The Court certified, that E. Southouse took an estate in fee. And Lord Kenyon observed, that the determination in Ansley *v.* Chapman, was founded on more limited grounds than those adopted in modern times. (*b*)

83. Where lands are devised, with a direction that the devisee shall pay an annual sum out of the rents and profits of the lands, the devisee will only take an estate for life. The cases on this point will be stated in the thirteenth chapter.

84. It has been resolved, in some modern cases, that *a devise generally, with a limitation over*, if the devisee dies under age, or without issue, will give the first devisee an estate in fee simple.[1]

85. A person made her will, beginning as follows: "As to my worldly affairs and estates, &c., I do dispose thereof in manner following." She then gave to her son J. H. a certain house; and if the said J. H. should happen to die in his minority, or before he came to age, then she gave the said house to her three daughters. (*c*)

Lord Mansfield said the devise over, if the son should die under twenty-one, to the three daughters, showed the intention of the testatrix to give a fee; for if he lived to twenty-one, he might then dispose of it himself; if he died before he could not,

(*a*) Andrew *v.* Southouse, 5 Term R. 292. [Right *v.* Compton, 9 East, 267.]
(*b*) *Infra*, c. 13. [See Jenkins *v.* Jenkins, Willes, 650.]
(*c*) Frogmorton *v.* Holyday, 3 Burr. 1618. 3 Ves. & Bea. 164.

[† In this case the Judges seem to have considered the charge upon the devisee; otherwise it would seem to have fallen within the principle of Doe *v.* Clarke, 2 Bos. & P., New. Rep. 343. See Roe *v.* Daw, 3 M. & Sel. 525. Bayley, J., seems to have taken this view of the case of Andrew *v.* Southouse.]

[1] If the devisee has the absolute right to dispose of the property at his pleasure, the devise over is inoperative. But where a life estate only is clearly given to the first devisee, with an express power, in a certain event, or for a certain purpose, to dispose of the property, the life estate is not, in that case, enlarged into a fee, and the devise over is good. Ramsdell *v.* Ramsdell, 8 Shepl. 288; and see Jackson *v.* Robins, 16 Johns. 537; Guthrie *v.* Guthrie, 1 Call, 7; Waring *v.* Middleton, 3 Desaus. 249; [McLean *v.* McDonald, 2 Barb. Sup. Ct. 534.]

and then she disposed of it. If the son was barely to take an estate for life, the time of his death must be immaterial to the devise over; but limiting it over only upon the contingency of his dying in his minority, showed that she intended to give him an absolute estate in fee, which he might dispose of if he
228* came * of age; and unless he lived to be of age, when he might dispose of it, she meant it should go to her daughters.

86. A person devised to the two children of his brother, when they attained the age of twenty-one years; but if either of them should die under the said age of twenty-one years, then the survivor should be heir to the other. (*a*)

It was resolved, on the authority of the preceding case, that the devisees took estates in fee.

87. Upon a case, sent from the Rolls, for the opinion of the Court of King's Bench, the facts were:—a person devised to certain of her grandchildren, as tenants in common; but in case of the death of either of them, under age, and without leaving any issue, the share of the person so dying to go to the survivor. It was certified, that the grandchildren took a fee. (*b*)

88. Where lands are *devised to trustees*, for the purpose of performing any trusts *which require the absolute property* of them, an estate in fee simple will pass to the trustees, without any words of limitation; for there is no difference between a devise to a person in fee simple, and a devise to a person upon trusts which require an estate in fee simple. (*c*)[1]

89. A person gave all and singular his freehold, leasehold, copyhold, and also his personal estate, of what kind soever, to trustees and their executors, administrators, and assigns, in trust to and for several uses, to pay several annuities, sums, and legacies, by and out of the produce of the personal estate; if that should happen to be deficient, then to pay the same by and out of the rents, issues, and profits arising by the real estate. (*d*)

One of the questions in this case was, whether the trustees took an estate in fee, under the devise.

(*a*) Doe *v.* Cundall, 9 East, 400. Doe *v.* Coleman. 6 Price, 179. The cases there cited. [Also Doe *v.* Nicholls, 1 B. & Cres. 336.]
(*b*) Toovey *v.* Bassett, 10 East, 460.
(*c*) Doe *v.* Willan, 2 B. & Ald. 84.
(*d*) Gibson *v.* Montfort, 1 Vez. 485.

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[1] See 4 Kent, Comm. 540; *Ante*, tit. 12, ch. 1, § 14, note; Doe *v.* Hewland, 8 Cowen, 277.

Lord Hardwicke was of opinion, that the inheritance passed to the trustees, and said it had often been determined, that in a devise to trustees, it was not necessary the word "*heirs*" should be inserted, to carry the fee at law; for if the purposes of the trust could not be satisfied without having a fee, courts of law would so construe it; as in Shaw *v.* Weigh, and several other cases. Here were purposes to be answered which, by possibility, and that was sufficient, could not be answered without the trustees having a fee, viz., the paying of several annuities and large pecuniary legacies, if the personal estate was deficient, which would probably be the case; then how was the rest to be raised, barely * by the rents and profits? It must be so, if *229 it was a chattel interest, for then it could not be taken out of the estate by anticipation; but that could not be in this case; for if the pecuniary legacies were not paid out of the personal, the real must be sold to satisfy them; for several of them were to be paid within a year after the testator's death, and could not therefore be paid by annual perception. This, then, was a purpose which it was impossible to serve, unless the trustees had the inheritance; for if they were to sell a fee, they must have a fee. (*a*)

90. G. B. devised several sums of £3 a year, some for life, and some in fee; and added, that these legacies were to be faithfully paid by his trustee J. C. every year. He also left to his trustee and executor £5 to build a tomb for him, he and his heirs always to see that it was kept in order, and appointed the said J. C. his sole executor and trustee. The Court was of opinion, that all the estate of the testator passed to the trustee in fee; because the intention was clear, that he meant to devise his real estate in trust; and there were trusts to be executed, which the trustee could not effectuate, without having an estate in fee devised to him; for there were annuities in fee charged on the real estate, and the estate must be coextensive with the charges. (*b*)

91. In commenting on the case of Vick *v.* Edwards, Mr. Fearne observes, that the first words alone would, from the nature of the trust, have carried the fee to the trustees. The latter words did not give it from them; which indeed would have been

(*a*) Fitzg. R. 7. [Trent *v.* Hanning, 7 East, 97.]

(*b*) Oakes *v.* Cooke, 3 Burr. 1684. [Doe *v.* Woodhouse, 4 T. R. 89. Anthony *v.* Rees, 2 Crom. & Jerv. 75.] Doe *v.* Gillard, 5 Barn. & Ald. 785.

an express negative upon the constructive operation of the first. But their effect was included in that of a devise to the trustees and their heirs, inasmuch as they expressly direct the fee to the same person as such a complete limitation would ultimately carry it to, viz., the survivor of the trustees. (*a*)

92. In the case of *chattels real*, that is, terms for years, *a general gift* of them will *pass all the estate and interest of the testator*, without any additional words.

93. The termor of a messuage for forty years, devised the messuage by his will, without any words of limitation. It was resolved, that the entire term passed, for the devisee could not have any estate in the house, at will, or for term of life, or for the term of any years, or a year, therefore the whole term passed. (*b*)

94. A disposition of a term for years to a person and the heirs of his body, is a disposal of the entire interest in the
230* term; for *a term cannot be entailed. But a devise over of a term, after a prior disposition of it to a person for life, is good by way of executory devise; of which an account will be given in a subsequent chapter. (*c*)

95. It is said by Lord Parker, that a devise of a term to one for a day, or an hour, is a devise of the whole term, if the limitation over is void, and it appear at the same time that the whole is intended to be disposed of from the executors. But if such an intention does not appear, then it has been held that a limitation of a term to one life, does not vest the whole so absolutely in him, as to be at his disposal; but leaves a possibility, viz., upon the death of the devisee within the term, of reverter in the executors of the testator. (*d*)

96. A being possessed of a term for ninety-nine years, devised it to B for life, remainder to C for life, and so on to five others, successively for life. It was resolved, that after the death of the seven persons to whom the term was devised for life, it should revert to the executor of the testator. (*e*)

97. [Where, by deed or will, the trust of a term *in gross* is to pay the rents and profits to the *cestui que* trust *generally*, (i. e.

(*a*) Tit. 16, c. 8. Fearne, Rem. 8th edit. 357. (*b*) Fenton *v.* Foster, 3 Dyer, 307, b.
(*c*) Tit. 8, c. 2. (*d*) 1 P. Wms. 666. Fearne's Ex. Dev. 487, ed. 8.
(*e*) Eyres *v.* Faulkland, 1 Salk. 231.

without words of limitation or restriction,) the *cestui que* trust will be entitled to the absolute interest in such term in gross. Yet it is otherwise, where a term is by such grant or devise carved out of the inheritance; in which case the *cestui que* trust will only be entitled to a life interest, and subject thereto, the term will attend in trust for the owner of the inheritance.] (*a*)

(*a*) Belt *v.* Mitchelson, Belt's Supp. to Vez. 238.

CHAP. XII.

CONSTRUCTION.—WHAT WORDS CREATE AN ESTATE TAIL.[1]

SECT. 1. *No Technical Words necessary.*
7. *The word* Heirs *qualified by subsequent words.*
20. *Or by a Remainder over to a collateral Heir.*
SECT. 27. *The words* Issue, Children, *&c.*
32. *An Estate Tail may arise by Implication.*
46. *A Devise for Life may be enlarged into an Estate Tail.*

SECTION 1. As lands may be devised in fee simple, without any of those technical words which are required in deeds, so may they be devised in tail; for *any words that indicate the testator's intent to restrain the descent* of the estate given *to the lineal descendants of the devisee*, will only pass an *estate tail.* Thus a devise to a person, *et semini suo*, or to a man and his wife, *et hæredi de corpore, et uni hæredi tantum* gives an estate tail. (*a*)

2. It was agreed by the Judges of the Court of K. B. in 36 Eliz., that a devise to one and the *heir* of his body, was an estate tail, and should go to all the heirs of his body; for heir was *nomen collectivum*, and one can have but one heir at one time; and this should go from heir to heir. (*b*)[2]

3. It has been stated, that a limitation in a *deed*, to a person and his *heirs male*, creates an estate in fee simple; but in a *will*, those words will create an estate tail. (*c*)

4. A person devised to his eldest son, all that his farm called

(*a*) 1 Inst. 9 b. 1 Vent. 228. (And see Tit. 2, ch. 1, § 22.) (*b*) Cro. Eliz. 314.
(*c*) Tit. 32, c. 21.

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[1] On the subject of this chapter, see the learned Essay of Mr. Hayes, on the Disposition of Real Estate.

[2] A devise to one "and his *oldest male heir*, forever," gives an estate tail. Cuffee *v.* Milk, 10 Met. 366; and see Hall *v.* Vandegrift, 3 Binn. 374; Hamilton *v.* Hempstead, 2 Day, 332. But a devise to one "and his *heirs lawfully begotten*, forever," without a limitation over, was held to give a fee simple. Paddison *v.* Oldham, 1 Har. & M'Hen. 336. [A devise by a father of certain real estate to his "son John, and the heirs lawfully begotten of his body, and their heirs and assigns," gives an estate tail to John, and the words "their heirs and assigns," do not enlarge the devise to a fee simple, either to him or the heirs of his body. Buxton *v.* Uxbridge, 10 Met. 87; Wight *v.* Thayer, 1 Gray, 284.

D., to him and his *heirs males* for ever. Resolved, that the eldest son took an estate in tail male; for the law would supply the words *of his body.* (*a*)

5. Where an estate is expressly devised to a person and the *heirs of his body*, no charge on such estate will enlarge it to an estate in fee simple. (*b*)

6. A person devised a messuage and lands to her eldest daughter Alice, and the heirs of her body lawfully to be begotten *forever; remainder to her other daughters in the *232 same manner, charged and chargeable with the full sum of nine score pounds, to be levied and raised out of the first clear annual profits of the said messuages, &c. And that her executors should stand possessed of the said messuage for so long a time as until they should raise the said sum; and to and for the benefit of her daughters A. M. and I. (to whom she had given the money) until the same should be paid by her eldest daughter Alice or her heirs, and from and after the raising thereof by Alice, or her heirs, it was her will that she *and her heirs* should enjoy the said messuages, &c. forever. (*c*)

It was resolved, that as the words of the devise created an estate tail; the charge on the lands, and the subsequent use of the words, "heirs of Alice," should be construed to refer to the special designation of heirs to whom the estate was devised at the beginning of the will; and therefore that Alice took only an estate tail. And Lord Mansfield observed, that there never was an instance of an estate in fee raised by implication from the circumstance of a charge being made by the devisor, where an express estate for life, or in tail, was given; and here it was an estate tail with several remainders over.[1] (*d*)

7. Although a devise to a person and his heirs gives him an estate in fee simple, yet if the word "*heirs*" be *qualified by any subsequent words, which show the intention* of the testator to *re-*

(*a*) Baker *v.* Wall, 1 Ld. Raym. 185. (Denn *v.* Fogg, 2 Penn. 819. Trevor *v.* Trevor, 1 H. L. Ca. 239.)

(*b*) (Willis *v.* Bucher, 2 Binn. 455, 464. Gause *v.* Wiley, 4 S. & R. 509.)

(*c*) Doe *v.* Fyldes, Cowp. 833. (Lithgow *v.* Kavanagh, 9 Mass. 161.)

(*d*) Denn *v.* Shenton *infra*, § 15. Denn *v.* Slater, *infra*, § 45.

[1] A devise "to A and her heirs lawfully begotten, and in case she dies without heirs," remainder over, gives A an estate tail. Pratt *v.* Flamer, 5 Har. & J. 10.

strain it to the heirs of the body of the devisee; the devise will, in that case, only *create an estate tail.*[1]

8. There is a case in Moore, in which it was held, that a devise to an unborn person *et hæredibus suis legitimè procreatis*, created an estate tail. And in a modern case sent out of Chancery, where there was a devise to a person and his heirs, lawfully begotten, forever, the Court of C. P. certified, that the devisee took an estate tail; though it was urged that the words *lawfully begotten* were surplusage, and equally applicable to collateral as to lineal heirs. It is however observable, that the testator had in another part of his will devised to a person and to his heirs forever; so that the variation of the phrase imported a variation of intent, which may have been the ground of the certificate. (*a*)

9. W. B. devised all his lands to John his son, and his heirs; and if he died *without issue*, he devised his lands in R.
233* *to M. his nephew in fee; and his lands in H. to H. his nephew in fee. (*b*)

It was resolved, that the first limitation to John was the same as if it had been to him and the heirs of his body, and no fee.

10. W. G. devised lands to his wife for life, and after her death, to John his eldest son, and to his heirs; upon condition that he, as soon as the land should come to him in possession, should grant to Stephen his second son, and his heirs, an annual rent of £4, out of the said tenements; and that if the said John died without *heirs of his body*, the land should remain to the said Stephen and the *heirs of his body.* The first question was,

(*a*) Church *v.* Wyat, Moo. 637. Nanfan *v.* Legh, 7 Taunt. 85. (Hall *v.* Vandergrift, 3 Binn. 347. Berry *v.* Berry, 1 H. & J. 417. Thomas *v.* Benton, 4 Desaus. 17.)

(*b*) Brown *v.* Jerves, Cro. Jac. 290. Doe *v.* Ellis, 9 East, 382. (Hawley *v.* Northampton, 8 Mass. 41.)

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[1] See Dott *v.* Cunnington, 1 Bay, 453; Duer *v.* Boyd, 1 S. & R. 203; Tidball *v.* Lupton, 1 Rand. 194; Gause *v.* Wiley, 4 S. &. R. 509; Sleigh *v.* Strider, 5 Call, 439; Bells *v.* Gillespie, 5 Rand. 273; Sharp *v.* Thompson, 1 Whart. 139; In re James, 1 Dall. 47; Dem. *v.* Cox, 4 Halst. 10; Caskey *v.* Brewer, 17 S. & R. 441; Sewell *v.* Howard, 1 Har. & M'Hen. 45; Mockbee *v.* Clagett, 2 Har. & M'Hen. 1; Shanks *v.* Blackiston, 4 Har. & M'Hen. 481. [Fisk *v.* Keene, 35 Maine, (5 Red.) 349; Wight *v.* Thayer, 1 Gray, 284; Perry *v.* Briggs, 12 Met. 17; Canedy *v.* Haskins, 13 Met. 389; Weld *v.* Williams, Ib. 486; Brown *v.* Lyon, 2 Selden, (N. Y.) 419; Morehouse *v.* Cotheal, 2 New Jer. 430; Lapsley *v.* Lapsley, 9 Barr, 130; Deboe *v.* Lowen, 8 B. Mon. 616; Chew *v.* Chew, 1 Md. 163; Nowlin *v.* Winifree, 8 Gratt. 346; Fraser *v.* Chene, 2 Mich. (Gibbs,) 81.]

whether John had an estate in fee by the devise; which being to him and his heirs, upon condition that he should grant a rent to Stephen and his heirs, it was said the intent was shown that he should have a fee, for otherwise he could not legally grant such a rent, to have continuance after his death. (*a*)

It was, however, resolved to be an estate tail; for, being limited, that if he died without issue, then it should be to Stephen and the heirs of his body, that showed what heirs of John were intended, namely, heirs of his body. But yet, by the limitation of the will, he was to make a grant of the rent, which being by appointment of the donor, it was not *contra formam donationis*, but stood with the gift, and should bind the issue in tail.

11. W. Hydes, having two sons, Thomas and Francis, devised all his lands to his wife for life, and after her decease, then he devised his lands in B. to Thomas, his son, and his heirs forever, and his lands in E. L. to Francis, his son, and his heirs forever; adding the following words, "*Item*, I will that the survivor of them shall be heir to the other, if either of them die without issue. (*b*)

It was resolved, that this was an estate tail; and that although the first part of the will gave a fee, the second part corrected it, and made it but an estate tail.

12. A person gave and devised all his freehold messuage, &c., to his son P. B., and his heirs forever, on condition that he should pay his son W. B. £30; and devised estates to his other sons in the same manner. Then followed this clause: "*Item*, my will and mind is, that in case any of my said children unto whom I have bequeathed any of my real estates, shall die without *issue, then I give the estate of him or them so dying, *234 unto his or their right heirs forever."

Lord Ch. J. Willes delivered the opinion of the Court, and said the question was, whether P. B., the devisee, took an estate in fee or in tail; and this was divided into two questions; I. Whether he would have had an estate tail in case the remainder had been devised over to a stranger. II. Whether devising it over to the right heirs of the person so dying without issue, made any difference.

(*a*) Dutton *v.* Engram, Cro. Jac. 427.

(*b*) Chadock *v.* Cowley, Cro. Jac. 695. (Williamson *v.* Daniel, 12 Wheat. 568. Haines *v.* Witmer, 2 Yeates, 400. Shanks *v.* Blackiston, 4 H. & M'Hen. 481.)

As for the first question, it could not be doubted, after so many solemn determinations, that if a man devised an estate to A and his heirs, and afterwards in his will gave his estate to another, in case A died without issue, the subsequent words reduced A's estate only to an estate tail; and restrained the general word *heirs* to signify only heirs of the body; and this was founded upon these known rules, that the intention of the testator shall always take place in the construction of wills, so far as it can be collected from the will itself, if it be not contrary to the rules of law; and that the priority or posteriority of words in a will was not at all regarded, but that the whole will must be taken together, to find out the intent of the testator. (*a*)

II. But this distinction was relied on, that though it would have this construction in case the remainder had been devised over to a stranger, it would be otherwise in the present case, because the remainder was devised over to the heirs of the person so dying without issue. This distinction, though it seemed at first to be of some weight, when considered, made no difference, either in reason or in law. Even in grants, where words were construed much stricter than in cases of wills, if there were words that created an estate tail, the grantee would have an estate tail, though the next remainder was limited to his right heirs; and nothing was more common in settlements than to limit an estate to a man and the heirs of his body, remainder to his right heirs; and for this plain reason, to prevent his disinheriting his issue, except by some solemn act done in his lifetime.

The Court was unanimously of opinion, that the devisee took an estate tail. (*b*)

13. It is observed by Mr. Durnford, in a note to this case, that by the words, *die without issue*, the devisor must have
235* meant *dying without heirs of the body, or without heirs generally. But to suppose that he used those words in the latter sense, would be to suppose that he intended to devise the lands to his son P. B., and his heirs forever, and if he die without such heirs, then to the same heirs. There seemed, there-

(*a*) [Romilly *v.* James, 6 Taunt. 274–275.]

(*b*) Brice *v.* Smith, Willes, 2. 1 Com. R. 538. (Hurlbert *v.* Emerson, 16 Mass. 241.)

fore less doubt in such a case respecting the devisor's intention, than in the ordinary case of a limitation over to a stranger, after a dying without issue by the first taker.†

14. J. Leslie devised lands to the use of his eldest son John, and his heirs forever; and failing issue of his said son John, then to the use of his second son James, and his heirs forever; and failing issue of that son, then to the use of his third son George, and his heirs forever; and failing issue of that son, then to the use of every other son that he should have, and their heirs forever; and failing his issue male, then to the use of his issue female and their heirs forever. It was determined by the House of Lords, on an appeal from the Court of Exchequer in Ireland, that according to the intention of the testator, his sons took successively estates in tail male; and that upon the death of the eldest son, leaving only a daughter, the second son took in the order of succession. (*a*)

15. A will was as follows: "I give to my grandson Samuel all my meadow, &c., to hold unto the said Samuel and the heirs of his body lawfully begotten, and their heirs forever; chargeable with the payment of £8 a year to my niece, &c. But in case the said Samuel shall die without leaving issue of his body, then I give the said meadow, &c. unto my nephew W. G." The question was, whether Samuel took an estate in fee, or an estate tail. It was contended that the testator meant the issue of Samuel should take an estate in fee; and that the devise over was in the event of Samuel's dying without issue living at the time of his death, by which means it would be an executory devise. (*b*)

Lord Mansfield said, the question was, whether the grandson took an estate tail, or an estate in fee. That the devise was to Samuel and the heirs of his body, and their heirs forever; but the words, *their heirs forever*, were qualified by the subsequent words, *in case he shall die without leaving issue*, which clearly *showed it to be an estate tail; and then the tes- *236

(*a*) Fitzgerald *v.* Leslie, 3 Bro. Parl. Ca. 154. Preston *v.* Funnell, Willes, R. 164.

(*b*) Denn *v.* Shenton, Cowp. 410. (Buxton *v.* Uxbridge, 10 Met. 87. Lithgow *v.* Kavenagh, 9 Mass. 166.) Doe *v.* Wetton, *infra*, c. 17, § 8.

[† But the construction is the same in either case, whether the limitation over be to a stranger, or to one who might be the heir.—Doe *v.* Ellis, 9 East, 382.

tator gave it over to the lessor of the plaintiff. It was too clear to admit of a doubt. Judgment, that Samuel took an estate tail.

16. I. Beech devised to his wife for life, and after her decease to be equally divided between his four children, H., I., E., and S., and to each of them and their heirs forever, share and share alike; and in case they should be minded and agree among themselves to sell the said estate, then every one of his said children should have their equal shares of moneys, from thence arising; but if they consented and agreed to keep the estate whole together, then and in such case all the rents, issues, and profits thereof, from time to time, as they should become due and payable, should be equally paid and divided between his four children, and to the several and respective heirs of them, on their bodies lawfully begotten, share and share alike. (*a*)

The Court said, that the children of I. Beech took only estates tail in the respective fourths; for though it was given to them and their heirs, and they had also a power of selling the estate, by the former part of the devise; yet the subsequent words, to the several and respective heirs of them on their bodies lawfully begotten, restrained the operation of the former words, and reduced the estate devised to an estate tail.

17. W. F. by will, after confirming his settlement, by which one part of the estate was limited to his wife for life, devised the rest of the premises to his daughter and only child Mary, on her attaining twenty-one, and to her heirs: and as to that part which was settled on his wife he devised the same to his said daughter, after the death of his widow. In case the widow should die before the daughter attained twenty-one, then he willed that both parts of the estate should go immediately to his daughter, and her heirs for ever; but he willed that his wife should hold and enjoy both parts until his daughter should attain the age of twenty-one; and in case his daughter should die without issue, then he empowered her to dispose of the whole by will, or any other instrument in writing, and for want of such issue and direction, &c., then that the same should descend and go to his own right heirs. (*b*)

(*a*) Roe *v.* Avis, 4 Term R. 605.

(*b*) Doe *v.* Rivers, 7 Term R. 276.

The Court was of opinion, that the daughter took only an estate tail.

*18. A person devised to her son Richard, and her daughter Elizabeth, and their heirs forever. Provided that if her said son and daughter should both have issue, then both their dividends aforesaid were to go to the issue of their own bodies: but if but one of them should have issue, then the premises should go to that issue, whether it were the child of her son or daughter aforesaid; but if they both died without issue of their bodies, then immediately to the right heir at law, and his heirs forever. (*a*) *237

The Court resolved that the devisees took an estate tail.

19. There are several cases, in which words, introducing remainders over, after a limitation to heirs, do not abridge or qualify the extent of the word "*heirs;*" of which an account has been given in a former title. (*b*)

20. In consequence of the principle, that there can be no remainder limited after an estate in fee simple; where there is a devise to a person and his heirs, and if he dies without heirs, remainder to a stranger, the remainder is void. But where lands are devised to a person and his heirs, with a *remainder to a collateral heir of the first devisee;* the word "*heirs*" will be construed to mean *heirs of the body*, and the first devisee will take only an *estate tail;* because the devise over to the collateral heir plainly denotes, that the testator only meant to give the lands to the lineal descendants of the first devisee; for the first devisee could not die without heirs, as long as the collateral heir, or any of his lineal descendants were existing. (*c*)

21. Thus, where a person devised his houses in London to Francis his son, after the death of his wife; and if his three daughters or either of them should overlive their mother, and Francis their brother and his heirs, then they to enjoy the same houses for term of their lives. The principal question was, whether Francis the son had a fee, or a fee tail, by the will, in regard the limitation was, if his sisters survived him and his heirs. (*d*)

(*a*) Doe *v.* Wichelo, 8 Term R. 211. [*Et vide* Tenny *v.* Agar, 12 East, 253.] Pierson *v.* Vickers, 5 East, 548.

(*b*) Tit. 16, c. 1.

(*c*) Fearne's Ex. Dev. 466, ed. 8. Att.-Gen. *v.* Gill, 2 P. Wms. 369. [Doe *v.* Bluck, 6 Taunt. 484.]

(*d*) Webb *v.* Hearing, Cro. Jac. 415.

The Court resolved, he had but a fee tail; for by "*heirs*," in this place, was intended "*heirs of his body;*" because the limitation being to his sisters, it was necessarily to be intended that it was, if he should die without issue of his body, for they were his heirs collateral. And therefore there was a difference, where a devise was to one and his heirs, and if he died without
238 * heirs, * that it should remain over; it was void, as 19 Hen. VIII. pl. 9; yet when a devise was to one and his heirs, and if he died without heir, it should be to his next brother, there was an apparent intention what heirs he intended; and the intention being collected from the will, the law would adjudge accordingly.

22. A testator devised lands to his wife for life, remainder to Henry his son for life, remainder to his son George and his heirs forever, and if he died without heirs, then to his two daughters, The question was, whether George took a fee simple, or only an estate tail. And the case of Webb *v.* Hearing was cited, to prove that where a devise is to one and his heirs, remainder over to another, who is, or may be the devisee's heir at law, such limitation shall be good; and the first limitation construed an entail, and not a fee, in order to let in the remainder-man; but where the second limitation is to a stranger, it is merely void, and the first limitation is a fee simple. (*a*)

Lord Talbot said George took an estate tail. The difference which had been taken was right; and the reason of it was, that in the latter case, there was no intent appearing, to make these words carry any other sense than what they imported at law; but in the former, it was impossible that the devisee should die without an heir, while the remainder-man or his issue continued; and therefore the generality of the word "*heirs*," should be restrained to heirs of the body; since the testator could not but know, that the devisee could not die without an heir, while the remainder-man or any of his issue continued. (*b*)

23. *The rule is the same* where the remainder is limited to the *heirs of the testator himself*, if such heirs must *also be heirs to the first devisee.* (*c*)

(*a*) Tyte *v.* Willis, Forr. R. 1.
(*b*) Pickering *v.* Towers, 1 Eden, 142. Goodright *v.* Goodridge, Willes, R. 369.
(*c*) Fearne's Ex. Dev. 467, ed. 8.

24. A person, having issue three sons, John, Francis, and William, devised his lands to Francis and his heirs; and for default of the heirs of Francis, to the heirs of the devisor. (*a*)

Lord Holt said, that although the devise to the heirs of the devisor, passed no estate to the eldest son, who took the reversion by descent, and not the remainder by purchase, yet it was sufficient to show the intent of the devisor, that the words of the devise, "to Francis and his heirs, and for want of such heirs," meant heirs of his body. And as the devisor said that his own right heirs should take after the death of Francis without * heirs, although the devisor's heir took nothing * 239 by this devise, for he took by descent, yet it appeared that the testator intended that when Francis was dead without issue, the eldest son should take; and the word "*heirs*" could not have any other construction but "*issue*," because he could not die without an heir as long as the testator had an heir. (*b*)

25. T. G. devised an estate to his grandson, for and during his natural life; and after his decease, to his right and lawful heirs and assigns for ever; and for want of such lawful heirs, he gave the same to another grandson, his heirs and assigns forever. (*c*)

The Court of K. B. certified to the Court of Chancery, that the grandson took an estate tail.

26. But where a devise was to a person and his heirs, and if he died without heirs, remainder to his half-brother; the devise was held by Lord Hardwicke to pass a fee; this being in fact a devise over to a stranger, as the law considers him; because he could not inherit from his brother. (*d*)

27. Where lands are devised to A and his issue, or to A "*and his children*," A having *no children at the time*, he will take an estate tail; because it is clearly the intention of the testator not to give A an estate for life only, but that his children should be benefited by the devise; and they cannot take as immediate devisees, not being in existence at the death of the testator;

(*a*) Nottingham *v.* Jennings, Com. R. 82. 1 P. Wms. 23.
(*b*) *Ante*, c. 8.
(*c*) Morgan *v.* Griffiths, Cowp. 234. Lewis *v.* Waters, 6 East, 336.
(*d*) Tilbury *v.* Barbutt, 3 Atk. 617. S. C. 1 Vez. 89.

nor can they take by way of remainder, the devise being immediate. (*a*) [1]

28. Mr. Viner, the author of the Abridgment, devised certain premises to Dr. Clifton, and the "*issue*" *of his body* lawfully begotten, living at his death, and for want of such *issue*, to the University of Oxford. (*b*) [2]

Lord Keeper Henley.—"This is the plainest case I ever saw in my life. The issue cannot take by present devise, as joint tenants with the defendant. They are not to take by remainder, but by descent, all the posterity are intended to take; it cannot therefore be a contingent remainder, but it is clearly an estate tail."

29. E. Wharton devised all the rest and residue of his estate, as well real as personal, to his nephew A. Wharton, and *his sons* in tail male, and for want of *such issue* in tail male, to his brother J. Wharton and his sons in tail male, and on
240* failure of *such issue, to his own right heirs. Neither A. nor J. Wharton had any issue at the time of making the said will, or at the death of the testator. A. Wharton died without issue. (*c*)

This case was sent from the Court of Chancery, for the opin-

(*a*) Wild's case, 6 Rep. 16. 1 Vent. 229. Frank *v.* Stovin, 3 East, 548. [Doe *v.* Davies, 4 B. & Adol. 43.] (*b*) Un. of Oxford *v.* Clifton, 1 Eden, 473.
(*c*) Wharton *v.* Gresham, 2 Black. R. 1088. 3 Term R. 373.

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[1] A devise was in these words;—"I give to my daughter M. and her children one half of my house and land, &c. Item, I give to my daughter J. and her children the other half of the aforesaid house, &c. But if either of my aforesaid daughters should die and leave no children, my will is, that my surviving daughters and their children should enjoy their deceased sister's part." At the time of the devise, M. was unmarried, and J. was married, but had no child. It was held to be a devise in fee tail. Nightingale *v.* Burrell, 15 Pick. 104. And see Parkman *v.* Bowdoin, 1 Sumn. 359; Wheatland *v.* Dodge, 10 Met. 502; Clark *v.* Baker, 3 S. & R. 470. [The word "*children*" held to be used synonymously with "*issue.*" Voller *v.* Carter, 29 Eng. Law & Eq. 267.]

[2] The word "*issue*," in a will, is not a technical expression; and therefore it will yield to the intention of the testator, to be collected from the whole will. Hence, also, it requires a less demonstrative context to show the testator's intention in regard to this word, than it does in regard to the technical expression "*heirs of the body.*" Lees *v.* Mosley, 1 Y. & C. 589. For the exposition of both these expressions, see Hayes on the Construction of Limitations, Prop. xiv., xv. p. 14–22. [See also, Wynch's Trust, 28 Eng. Law & Eq. 378.]

ion of the Court of C. B., and the certificate was, that J. Wharton took an estate in tail male in the premises.

30. C. Stevens, being seised in fee of the lands in question, devised the same in the following manner:—"I also give and devise to my son William Stevens, when he shall accomplish the full age of twenty-one years, the fee simple and inheritance of Lower Shelton, to him and *his child and children* forever. But if my son W. S. should happen to die before he should accomplish the full age of twenty-one; then I give and bequeath the fee simple and inheritance of Lower Shelton to my wife forever. (*a*)

Lord Mansfield said, if the testator had used the words, "*all his estate*," "*inheritance*," or "*forever;*" and had stopped there, the fee simple would have passed; but the words "*child*" or "*children*" were to the full as restrictive as if he had said, "and if my son die without heirs of his body." The words of the will gave the son an estate tail, for there were no children born at the time, to take an immediate estate by purchase: the meaning was the same as if the expression had been to William and his heirs, that is to say, his children, or his issue. The word, "*forever*," made no difference, for William's issue might last forever. (*b*)

31. The Master of the Rolls directed the following case to be made, for the opinion of the Court of K. B. T. Lowe devised to his daughter Anne, all his estate and effects, real and personal, and added these words,—"who shall hold and enjoy the same as a place of inheritance, to her and *her children, or her issue* forever. And if it should so happen that my daughter Anne should die leaving no *child or children*, or if it so happen that my daughter Anne's children should die without *issue*," then he directed his estates to be sold. (*c*)

The Court certified that Anne took an estate tail.

32. An *estate tail* may be created in a will, *by mere implication*, without any express words of devise.[1] As, where S. A. had

(*a*) Davie *v.* Stevens, 1 Doug. 321.
(*b*) [Doe *v.* Bradley, 16 East, 399, 403–4.]
(*c*) Wood *v.* Baron, 1 East, 259.

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[1] See 2 Jarm. on Wills, ch. 39, *per tot*, Perkins's ed.; Jackson *v.* Billinger, 18 Johns. 368, 381, per Spencer, C. J.

issue three sons, B, C, and D; B died, leaving his wife *ensient;* S. A. devised to the child his son's wife then went with, £20 yearly, and if his son C die before he had any
241 * issue of his * body, so that his land descended to D before he came to twenty-one years, then his executors should occupy it till D was twenty-one years of age. It was held, that C took an estate tail by implication, as well by the words—"If he die before he has issue," as if it had been, "If he die without issue." (*a*)

33. One Counden devised as follows:—"As touching all my lands in T. &c., whereof I now stand seised, which of right will, and my only intent and meaning is, shall descend and come unto John Counden my son, after my decease, this is my will." And then appoints that certain persons should receive the profits of them till his son came to twenty-four years, and then they to make an account and satisfy him. Then adds this clause,—"Provided always, that if my son John *shall happen to decease without issue of his body*, then I will all and singular my said lands, &c. shall go unto the right heirs males and posterity of my name forever." It was held that John Counden took an estate tail. (*b*)

34. R. W. having two sons, Richard the elder, and William the younger, devised in these words:—"It is my will, that if Richard my son shall happen to die, and leave no issue of his body lawfully begotten, that then and in that case, and not otherwise, after the death of the said Richard my son, I give and bequeath all my lands of inheritance in L. unto the said William my son, to have and to hold the same, after the death of the said Richard, to him and his heirs." Adjudged by Baron Price, that Richard took an estate tail by implication. (*c*)

35. I. G. having two sons, Richard and John, devised all his lands to his wife for life, and then proceeded in these words,—"And my will is, that if my son Richard do happen to die without heirs, then my son John shall enjoy my lands." Resolved, that Richard took an estate tail by implication. (*d*)

(*a*) Newton *v.* Barnardine, Moo. R. 127.

(*b*) Counden *v.* Clerke, Hob. 29. (M'Clintick *v.* Manus, 4 Munf. 328. Terry *v.* Briggs, 12 Met. 17.)

(*c*) Walter *v.* Drew, Com. R. 372. (Roe *v.* Vernon, 5 East, 85.)

(*d*) Goodridge *v.* Goodridge, 7 Mod. 453. Willes R. 369.

36. A person, having issue a son, B., who was his heir apparent, and two daughters, devised in these words:—"If it happen my son B. and my two daughters to die without issue of their bodies lawfully begotten, then all my lands shall be and remain to my nephew D. and his heirs forever." (*a*)

It was held, I. That no express estate was by this will given to his children. II. Nor any estate by implication; because then it must either be a joint estate for life, with several inheritances in tail, or several estates tail in succession one after *another. The last it could not be, because it was uncertain which should take first, which next; and the first it should not be, because the heir at law is not to be disinherited without a necessary implication, which in this case there was not; for it was only a designation or appointment of the time when the land should come to the nephew. *242

37. It was resolved, in 1 & 2 Eliz., that a devise to A and the heirs male of his body, and if he chance to die without heirs of his body, remainder over, only created an estate in tail male; because an implication shall not control an express limitation. (*b*)

38. A devise to a person generally, without any words of limitation, which of itself would create no more than an estate for life, may be *enlarged by implication into an estate tail.*

39. M. Sonday devised a house to Margaret, his wife, for life, and after her decease, his son William to have it; and if his son William married, and had by his wife any male issue, lawfully begotten of his body, then his son to have it; if he had no male issue lawfully begotten of his body, then his son Samuel to have the house. And added a clause, that if any of his sons or their heirs male, issue of their bodies, went about to aliene or mortgage the house, then the next heir to enter. (*c*)

It was resolved, that an estate tail male was created, for three reasons. I. Because the testator says, "If he hath no issue male, his next son to have it," which was as much as to say, "if William dies without issue male," which words were sufficient to create an estate tail in him. II. The last clause, "if any of

(*a*) Gardiner *v.* Shelton, 1 Ab. Eq. 197.
(*b*) Turke *v.* Frencham, 2 Dyer, 171 *a.* 1 Vent. 230. (Willis *v.* Bucher, 2 Binn. 455.)
(*c*) Sonday's case, 9 Rep. 127.

his sons or their heirs male, issue of their bodies, go about," &c. III. The thing prohibited proved it, for if the sons only took an estate for life, this restraint would have been idle.

40. A person devised to his three daughters, to be equally divided; and if any of them died before the other, then the one to be the other's heir, equally to be divided; and if his three daughters died without issue, then he willed it to two strangers. Adjudged that the daughters took estates tail. (*a*)

41. A person devised land to his wife for life, and after to his son, and if his son died without issue, having no son, that another should have it. Adjudged, that the son took an estate tail. (*b*)

42. A man, having issue two sons, devised all his land to his eldest son, and if he died without heirs male, then to his other son in like manner. (*c*)

243* * The Court said, it was plain the word "*body*," which properly created an estate tail, was left out; but the intent of the testator might be collected out of his will, that he designed an estate tail, for without this devise, it would have gone to his second son, if the first had died without issue. It was therefore an estate tail.

43. R. Johnson, being seised in fee of a copyhold estate, devised to J. W. his house in the Brook, and £30; and to W. T., his sister's son, a house with the ground and outhouses thereto belonging; and declared his will and meaning to be, that if either of the persons before named died without issue lawfully begotten, then the said legacy should be divided equally between them that were left alive. Adjudged, that W. T. took an estate tail. (*d*)

44. A person devised to the three sons of C. D. successively in tail male, remainder to every son and sons of the said C. D. which should be begotten on the body of Sarah his wife; and for want of such issue, to W. H., &c.; with a proviso, that the first devisee, and others to whom the estate was devised, and his and their descendants should, when in possession, take the surname and arms of the testator. (*e*)

(*a*) King *v.* Rumball, Cro. Jac. 448.
(*b*) Robinson *v.* Miller, 1 Roll. Ab. 837.
(*c*) Blaxton *v.* Stone, 3 Mod. 123.
(*d*) Hope *v.* Taylor, 1 Burr. 268.
(*e*) Evans *v.* Astley, 3 Burr. 1570.

The Court resolved, that the after-born sons took several estates in tail male, in succession; as the words, "*for want of such issue*," must be construed, for want of heirs male of the body; and that this was the true construction.

45. A person devised in these words: "I give and bequeath all my copyhold lands to my nephew Isaac Slater; but if the aforesaid Isaac Slater shall die without male heir, then my will is, that my nephew John Slater shall enter upon and enjoy the said copyhold lands, his heirs or assigns forever; provided the aforesaid Isaac Slater paid to his wife Elizabeth the sum of £8 a year during her life; with a power of entry to the wife if the annuity was not paid." (*a*)

It was contended, that Isaac took a fee by reason of the annuity.

Lord Kenyon said it was clear, from all the cases on the subject, that Isaac took only an estate tail. He cited the case of Blaxton *v.* Stone, and Burley's case, 43 Eliz. stated by Lord Hale in 1 Vent. 230; which was a devise to A for life, remainder to the next heir male; for default of such heir male, then to remain. Adjudged an estate tail.[1]

*With regard to the other question, the law was very *244 accurately stated by Lord Mansfield, in the case in Cow-

(*a*) Denn *v.* Slater, 5 Term R. 335.

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[1] The following are also cases of estates tail by implication, arising from a limitation over upon the contingency of dying without issue, &c. Lillibridge *v.* Adie, 1 Mason, 224; Osborne *v.* Shrieve, 3 Mason, 391; Wright *v.* Scott, 4 Wash. 16; Willis *v.* Bucher, 3 Wash. 369; 2 Binn. 455; Hurlbert *v.* Emerson, 16 Mass. 241; Dart *v.* Dart, 7 Conn. 250; Wadsworth *v.* Hudson, 8 Conn. 348; Williams *v.* M'Call, 12 Conn. 328; Ide *v.* Ide, 5 Mass. 500; Hawley *v.* Northampton, 8 Mass. 3; Jackson *v.* Billinger, 18 Johns. 368; Lion *v.* Burtis, 20 Johns. 483; Haines *v.* Witmer, 2 Yeates, 400; Clark *v.* Baker, 3 S. & R. 470; Hill *v.* Burrow, 3 Call, 342; Tate *v.* Tally, Ibid. 354; Selden *v.* King, 2 Call, 73; Elbridge *v.* Fisher, 1 Hen. & Munf. 559; Hoxton *v.* Archer, 3 G. & J. 199; Wheatland *v.* Dodge, 10 Met. 502; Shoemaker *v.* Huffnagle, 4 W. & S. 437; Elliott *v.* Pearsoll, 8 W. & S. 38; Eichelberger *v.* Burnitz, 9 Watts, 447; Somers *v.* Pierson, 1 Harr. 181; Thomason *v.* Andersons, 4 Leigh, 118.

See also, Abram *v.* Ward, 6 Hare, 165; 11 Jur. 867; Lewis *v.* Puxley, 16 Law J. 216, Exch.; 16 M. & W. 733, S. C.; Mellish *v.* Mellish, 2 B. & C. 520; 3 D. & R. 804, S. C.; Simmons *v.* Simmons, 8 Sim. 22; Machell *v.* Weeding, Ibid. 4; Grimshawe *v.* Pickup, 9 Sim. 591; Dunk *v.* Fenner, 2 Russ. & My. 557; Terry *v.* Briggs, 12 Met. 17.

per, where an estate was given generally, without adding words which would create a fee, or an estate tail, and it was charged with the payment of annuities; the devisee took a fee; but that was not the case where an estate tail was given to the devisee. (*a*)

46. An express *devise to a person for life* may be *enlarged by subsequent words*, or by a *necessary implication*, into an *estate tail;* for where an estate is devised to a person for life, with a devise over, which is not to take effect while there is any issue of the devisee for life, if there be no words in the will under which the issue can take as purchasers, the courts, in order to carry the manifest general intent of the testator into effect, have disregarded the particular intent, and by enlarging the estate devised for life into an estate tail, have let in all the issue of the first devisee. (*b*) [1]

47. Lands were devised to A for life, without waste, with a power to make a jointure; remainder to his first, second, and so to his sixth son, and no further; after which followed these words, "if A should die without issue male of his body, then to B in fee." (*c*)

This case having been sent out of Chancery, to the Court of C. B., it was resolved there, that there being no limitation beyond the sixth son, and for that there might be a seventh, who was not intended to be excluded, therefore to let in the seventh and subsequent sons to take, but still to take as issue and heirs of the body of A in tail by descent, and not by purchase, the Court held, that the words, "in case A should die without issue male of his body," did, in a will, make an estate tail.

48. J. Sutton devised a house to his nephew Thomas Sutton

(*a*) Doe *v.* Fyldes, *ante*, s. 6.

(*b*) (Evans *v.* Davis, 2 Yeates, 332. In re James, 1 Dall. 47. Malcolm *v.* Malcolm, 3 Cush. 472.)

(*c*) Langley *v.* Baldwin, 1 P. Wms. 759. Fitz. 13. 8 Mod. 258.

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[1] Where estates tail are abolished, or turned into other estates by statute, as is the case in many of the American States, the Courts, it seems, will not, by implication, turn an express estate for life, with limitations over in remainder, into a fee tail; because, though it is done, in England, to give effect to the general intention of the testator, yet in those States where estates tail are no longer known, such a construction would defeat that intention. Smith *v.* Chapman, 1 Hen. & Munf. 240, 303; *ante*, tit. 2, ch. 2, § (44.) And see Anderson *v.* Jackson, 16 Johns. 382.

for and during the term of his natural life, and after his death, to the first son or issue male of his body, lawfully begotten, and to the heirs male of the body of such first son; and for default of such issue, to the second son or issue male of the body of the said Thomas, lawfully to be begotten forever. And from and immediately after the death of the testator's wife, and of his said nephew Thomas Sutton, without issue male of his body, or after the death of such issue male, he devised all the said premises to trustees for charitable purposes. (*a*)

*It was resolved by the Court of Exchequer, that Thomas Sutton took an estate tail by implication. *245

On an appeal to the House of Lords (*b*) it was insisted on behalf of the appellants, that it was most manifestly the intention of the testator, that his nephew Thomas Sutton, who was not his heir at law, should have no greater estate than for his life only: and accordingly the estate was expressly limited to him for and during the term of his natural life, with remainders to his sons as purchasers. That it could not be pretended there were any words in the will, which, in a deed, could possibly have created an estate tail in Thomas Sutton; if therefore any such estate was created, it must be by implication, or presumption of the testator's intention, and not by the legal import or construction of the words themselves; but that such an implication was directly contrary to the express declaration of the testator in almost every branch of his will, as well as destructive of the charities which he intended to establish.

On the other side it was argued, that under the testator's will, Thomas Sutton took an estate tail by implication, the remainder being after his death without issue male. As to the objection that the limitation after his death, without issue male of his body, was to be understood such issue male as was mentioned in the will, viz. his first and second sons; it was answered that all the issue male which Thomas Sutton might possibly have, viz. his third, fourth, and every other son and sons, not being expressly provided for by the will, the limitation after his death without issue male, raised the same estate to him by implication, as if it had been limited to him and his issue male, in express words.

(*a*) Att.-Gen. *v.* Sutton, 1 P. Wms. 754. (*b*) 3 Bro. Parl. Ca. 75.

The decree of the Court of Exchequer was affirmed.

49. On a trial at the great sessions for the county of Flint, the jury found a special verdict, that T. Ravenscroft had devised lands to trustees and the survivor of them, in trust for his sisters Ann and Dorothy, equally between them, during their natural lives, without committing any manner of waste; and if either of his said sisters happened to die, leaving issue or issues of her or their bodies, then in trust for such issue or issues of the mother's shares, or else in trust for the survivor or survivors of them, and their respective issue or issues: and if it should happen
246 * that *both his said sisters died without issue as aforesaid and their issue or issues to die without issue or issues, then the trustees to stand seised for his kinsman John Swift, and the heirs male of his body. The Court of Great Sessions determined, that Dorothy, having survived her sister Ann, was tenant in tail of one moiety under the devise, and of the other moiety as a remainder, upon the death of her sister without issue. (*a*)

Upon a writ of error in the Court of K. B. Lord Ch. J. Raymond delivered the opinion of the Court, in a long and elaborate argument, that Ann and Dorothy took only an estate for life: that the word "*issue*," in the first place, was a word of purchase and the subsequent words were words of limitation, and created an estate tail in such issue. Consequently, the judgment of the Court of Great Sessions was reversed. (*b*)

A writ of error was then brought in the House of Lords, where it was argued, on behalf of the plaintiff in error, that by the words and intention of the will, the testator's two sisters, Ann and Dorothy, had an estate tail, as tenants in common, with cross-remainders of their several moieties; and as Ann died without issue, Dorothy became entitled to the whole estate; for that in construction of law, a devise to one with a limitation over to another, if such first person dies without issue, creates an estate tail in that person, as well as if the devise had been to him or her, and the heirs of his or her body.

For the defendant in error it was said to be a known rule, in the construction of wills, that the intention of the devisor ought in all cases to be observed, if it can be, consistent with the rules

(*a*) Sparrow *v.* Shaw, 3 Bro. Parl. Ca. 120. [Ward *v.* Bevil, 1 Yo. & Jer. 512.]
(*b*) Shaw *v.* Weigh, Fitz. 7. *Vide* c. 14, § 60.

of law. Now this devise was expressly to the sisters during their natural lives, with the addition of this restrictive clause, without committing any manner of waste, which showed the intent of the testator, strongly, that his sisters should only have an estate for life; for if he had intended them an estate tail, he could not have restrained them from committing waste. That the next devise was to the issue of the sisters, with the limitations annexed thereto, as in the will; and it was contended, by the plaintiffs in error, that the word "*issue*" was a word of limitation, and should raise an estate tail in the sisters. But it was hoped that "issue" would here be construed as a word of purchase, and a designation of the persons intended to take the estate; in which case, it could never extend to enlarge the estate given to *the sisters for life. In a will, it might some- *247
times be taken as a word of limitation, to answer the testator's intention, where such intention appeared manifestly from the construction of the whole will. But in the present case, it was plain the testator intended that the issue of his sisters should take by purchase, and therefore he made use of the word "*issue*" as a designation of the persons who were to take; for he did not barely give the estate to the issue or issues of his sisters, but further devised it to the survivor or survivors of them, and their respective issue or issues, that is, to the issue or issues of such issue or issues as his sisters should leave; for the word "*survivors*," in the plural number, was not applicable to the sisters, there being but two of them, but must relate to their issue. The first limitation therefore was to the issue of the issue, whence the first issue, to whose estate this limitation was annexed, must take by purchase.

It had been objected, that the word "*issue*" was *nomen collectivum*, and should take in all the descendants, and consequently create an estate tail in the sisters. But the word "*issue*" was only to be understood in this sense when it was a word of limitation; for it had always been taken in a different sense when it was a word of purchase. It had also been insisted on, that an estate tail should be raised in the sisters by implication, from these words, "*if it shall happen that both my said sisters die without issue as aforesaid, and their issue or issues to die without issue or issues*," then the subsequent remainders were given. Wherever

an estate tail had been raised by implication, it had been to answer the apparent intention of the testator; but in the present case, the very words from which an estate tail was to be implied, showed that the testator took notice that he had before limited the estate to the issue of the issue. Besides, the words were not general, "*if both my said sisters die without issue;*" but, "*if both my said sisters die without issue as aforesaid,*" which showed the testator's intention not to enlarge the estate before given to his sisters.

The Judges attended, and having conferred with the Lord Chancellor, his Lordship acquainted the house, that the Judges of the King's Bench were of the same opinion they were when they gave judgment in this case; but that there was a difference of opinion in the Judges of the Common Pleas and Barons of the Exchequer, who desired time to confer, in order to be
248* more *clear in their opinions. Some days after, all the Judges attended; and after delivering their opinions *seriatim* in relation to a point of law to them proposed, it was ordered and adjudged, that the judgment given in the Court of King's Bench, reversing a judgment given in the Court of Great Sessions, should be reversed; and that the judgment of the Court of Great Sessions should be affirmed. (*a*)

50. G. Robinson devised a real estate to Launcelot Hicks, for and during the term of his natural life, and no longer; provided he altered his name and took that of Robinson, and lived at his house at Bochym; and after his decease, to such son as he should have, lawfully to be begotten, taking the name of Robinson; and for default of such issue, then he bequeathed the same to his cousin W. R. and his heirs forever. (*b*)

Upon a bill to establish this will, and to carry the trusts of it into execution, Sir Joseph Jekyll declared that Launcelot Hicks, alias Robinson, was entitled to an estate for life, with remainder to his eldest and but one son, for his life; and that the remainder would go over to W. R.

On an appeal from this decree, Lord Talbot affirmed it, as to the interest which L. Hicks took in the testator's estate under his will, by a declaration in the very words of the former decree.

(*a*) Stanley *v.* Leonard, 1 Eden, 87. Amb. 255.
(*b*) Robinson *v.* Hicks, 1 Burr. 38. 2 Vez. 225. Lord Ken. R. 298.

Launcelot Hicks had two sons, George, who died an infant, and Edmund, who filed another bill against W. R., the devisee in remainder, and the trustees, for an execution of the trust of the will.

Lord Hardwicke ordered a case to be made for the opinion of the Court of King's Bench, upon the following question: — "Whether any and what estate or interest in the premises in question, did, by virtue of the said will, vest in the said Edmund."

The Judges certified their opinion, that upon the true construction of the will, Launcelot Hicks must by necessary implication, to effectuate the manifest general intent of the testator, be construed to take an estate in tail male; he and the heirs male of his body taking the name of Robinson; notwithstanding the express estate devised to the said L. Hicks for his life, and no longer.

The cause coming on to be heard on this certificate, before the Lords Commissioners, they confirmed it.

*On an appeal to the House of Lords, it was argued on *249 behalf of the appellant, that the greatest difficulty occurring in the construction of wills was, to form a true judgment where the presumed general intent of a testator ought to prevail, and where the legal operation of his words should take place. If the intention could be collected clearly from plain decisive evidences, such as had been received and allowed in courts of law and equity, by the current of authorities in similar cases, it must prevail. But if, on the one hand, the presumed intention be obscure and ambiguous, not necessarily implied in the words, and wholly inconsistent with the legal operation, and if, on the other hand, the legal operation produces a clear uniform sense, without contradiction or absurdity, that construction ought to be preferred which explains the intention of the testator with the least violence to his words. That though this case arose upon the devise of a trust, yet the Court of Chancery, in sending it to a court of law, judged that it ought to be governed by the same rules of construction as the devise of a legal estate; and it was submitted that the will afforded no stronger coercive legal evidences of intent, such as must induce a court of law, from the necessity of his meaning, to overrule the legal operation of his

words, and vest an estate of inheritance in tail male in L. Hicks, in prejudice to his heir at law. (*a*)

It would serve to explain the grounds on which the appellant proceeded, if it was considered, I. What estate was devised to L. Hicks the father. II. What estate was devised to his son. As to the first question, the testator had not left the possibility of a doubt, if his express declaration deserved any weight. He devised all his estate to L. Hicks, the father, for life, *and no longer;* enforcing his devise by negative words, which had hitherto been allowed, in all the cases adjudged, to be sufficient to prevent any implication by way of enlarging the estate, and extending the duration of it; so that the decree of the Court of Chancery, grounded upon the certificate of the Court of K. B., controlled not only the legal force of the words, but their meaning in common use, and in effect expunged them out of the will: that as all the authorities concurred against enlarging an estate for life into an estate of inheritance, where negative words were added, to strengthen the express devise; so likewise they were uniform in not raising an estate tail by implication in the tenant
250* for *life, either by way of present estate in possession, or by way of remainder in tail, after other limitations, unless the testator had limited express estates of inheritance to some of the sons or issue of the ancestor, tenant for life, *nominatim*, or by description; and then devised over the lands to another family, in default of issue *generally* of that ancestor. But this was the first case, in which it had been held, that the tenant for life took an estate tail by implication, in virtue of the connecting words, "*for want of such issue*," where the default of issue on which the implication was raised, was not general, but relative, by force of the word *such*, to a particular antecedent limitation; and where that antecedent limitation was made only to one son of the tenant for life, without any collective description of his heirs male, or heirs of his body, and without any words devising an inheritance to that son.

As to the second question,—what estate was devised to the son of L. Hicks,—if the father took only an estate for life, there was no color to say that any one could entitle himself as devisee of an estate of inheritance, by words of purchase in the will. The

(*a*) 3 Bro. Parl. Ca. 180.

devise was made, after the death of L. Hicks, to such son as he should have: no express words of limitation were annexed to it, to give an inheritance; no words on which it could be implied: the only doubt arising on some words, which referred clearly to a failure of issue (whether a general or limited failure was the question,) not of the son, but of the father; hence it followed, that the son, intended by the will, could only take an estate for life.

In support of the decree, it was contended that the words, "*son*," "*children*," "*issue*," and "*heir*," in a will, where no son was in being at the time of the devise, were *nomina collectiva*, and sufficient to create an estate of inheritance, and carry the land, not only to the immediate heir or issue, but to all that descended from the devisee: that the testator in this case could not have any particular person in view to take, but the issue male of L. Hicks in a collective sense, was clear; because at the time of making his will, L. Hicks was a bachelor, and therefore to suppose he could mean to give a life-estate only to some one son of L. Hicks, not then in being, would be a construction equally illiberal and absurd: that this was made still plainer by the words which followed, namely, "*for default of such issue;*" for *these words explained what kind of an estate, *251
as to its continuance or duration, the devisee should take, and were so frequently used to denote an estate tail, that they were become almost technical: so that express words were hardly better to be understood than the implication arising from this phrase: that in the case of wills, the testator was *inops consilii*, and had not always opportunities of observing the formalities of law: and it was a general rule, that the intention of the testator was to govern in the construction of wills; and that the Judges would go as far as they could to assist and give effect to such intention; and therefore, as the word "*son*" would, in a will, signify an estate tail, as well as the words "*issue*" or "*children*," it was insisted that the devise in the will must, by consequence and operation of law, to manifest the intent of the testator, be construed to create an estate tail.

The Judges were directed to give their opinions upon the following question;—Whether any and what estate or interest vested in Edmund Hicks; to which the Lord Ch. B. delivered

their unanimous opinion, that an estate in tail male was vested in Edmund Hicks, as heir male of the body of Launcelot Hicks: whereupon the decree was affirmed.

51. A. Dymock devised to his nephew, William Dymock, all his freehold estate at A., to hold to him during his natural life; and after his decease, to and amongst his issue; and in default of issue, to be divided between his nephew and niece, their heirs and assigns forever. (*a*)

Lord Kenyon.—"Although this will is very inaccurately drawn, I think we may collect the devisor's general intention, from the words of it. The great question in this case is, what estate W. Dymock took under the will. In the first clause, the estate is expressed to be given only during his natural life; but in the next limitation, it is to go to his issue, and in default of issue only it was to go over; it is clear, therefore, from the whole of the will, that the devisor did not intend that it should go over to those in remainder, until after a general failure of issue in W. Dymock. Now, I think we are warranted by many determinations, and particularly by that of Robinson *v.* Hicks, to give that effect to the will which will best answer the devisor's *general intention*, though by so doing we may defeat some *particular intent*.[1] Here the general intent was, that W. Dymock

(*a*) Doe *v.* Applin, 4 Term R. 82.

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[1] See acc. Doe *v.* Halley, 8 T. R. 5, 9; Sherratt *v.* Bentley, 2 My. & K. 149. But this rule was questioned, and limited in its application, in the subsequent case of Doe *v.* Gallini, 5 B. & Ad. 621, by Lord Denman, in delivering the judgment of the Court, in the following terms:—"The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late; as being, as a general proposition, incorrect and vague, and likely to lead, in its application, to erroneous results. (See Powell on Devises, 3d ed. c. 27, Vol. II. p. 552.) In its origin, it was merely descriptive of the operation of the rule in Shelley's case; and it has since been laid down in others, where technical words of limitation have been used, and other words, showing the intention of the testator, that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator use inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense: and so it is said, by Lord Redesdale, in Jesson *v.* Wright, 2 Bligh, 57. This doctrine of general and particular intent ought to be carried no further than this; and

and *his issue should take first: then what construction *252
will best effectuate that intention? It has been argued by the plaintiff's counsel, that W. Dymock took only an estate for life, and his children an estate tail; but it would be difficult to put two different interpretations on the word "*issue:*" and even if that could be done, it would not further the intention of the devisor in this case; for there are no cross remainders to the children, and they never can be implied; so that according to the construction contended for, if one of the children died, his share would go over to those in remainder, in prejudice of those children who survived; which was certainly not intended by the devisor. Therefore we shall best answer his general intent by saying that W. Dymock took an estate tail: and in so determining, we shall not go further than has been done in other cases." Judgment was given accordingly. (*a*)[1]

52. A person devised all his freehold messuages, &c., to his daughter Mary Ayscough, and the heirs of her body lawfully to be begotten, for ever, as tenants in common, and not as joint tenants; and in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then he gave his freehold messuages to R. Ayscough, in fee. (*b*)

Lord Kenyon said, it was a rule of construction in cases of this kind, settled by a variety of decisions, but particularly by that of Robinson *v.* Hicks, that where it appeared in a will that the testator had a general intention, and also a secondary intention, and they clashed, the latter must give way to the former. Here were no words of limitation added to the estate given to the children, (supposing they took as purchasers,) and yet the remainder over was not to take place till there was a general

(*a*) Denn *v.* Puckey, 5 Term R. 299. (*b*) Doe *v.* Smith, 7 Term R. 531.

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thus explained, it should be applied to this and all other wills. Another undoubted rule of construction is, that every part of that which the testator meant by the words he has used, should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject." See also, 3 Ad. & El. 340; 4 Nev. & M. 894, S. C.

[1] Franks *v.* Price, 5 Bing. N. C. 37; 3 Beav. 182; Medlycott *v.* Jortin, 6 Moore, 1; 2 B. & B. 632; Broadhurst *v.* Morris, 2 B. & Ad. 1; Doe *v.* Charlton, 1 M. & G. 429; 1 Scott, N. R. 490.

failure of her issue; so that there must be an estate to comprehend all her children forever. He concluded in these words:—"I admit that in this case the testator intended that his daughter M. A. should only take an estate for life, and that her children should take as purchasers; but then he also intended that all the progeny of those children should take before any interest should vest in his more remote relations; now the latter intention cannot be carried into effect unless M. Ayscough takes an estate in tail; in order, therefore, to give effect to the devisor's
253 * *general intention, according to the fair construction of the will, M. Ayscough must take an estate tail." (*a*)

53. H. Cook devised a messuage to R. Cook for the term only of his natural life; and after his decease, he gave and devised the same unto the lawful issue of the said R. Cook, as tenants in common; but in case the said R. Cook should die without leaving lawful issue, then, and in such case, after his decease, he gave and devised the same to Eliz. Harding in fee. (*b*)

Lord Kenyon said, it had been the settled doctrine of Westminster Hall, for the preceding forty or fifty years that there might be a general and a particular intent in a will; and that the latter must give way, when the former could not otherwise be carried into effect. That this doctrine had been confirmed by the cases of Robinson *v.* Hicks, Roe *v.* Grew, and others. That perhaps the Court would best fulfil the particular intent of the testator in this case, by giving R. Cook only an estate for life; but the general intent was, that all his issue should inherit the entire estate, before it went over; and that intent could only be answered by giving him an estate tail, by implication from the subsequent words, in default of his leaving issue. (*c*)

Judgment was given accordingly.

54. In the case of a devise to the use of testator's daughter for her life, and after her decease to the use of the issue of her body lawfully begotten, and in default of issue, or in case none of such issue live to attain the age of twenty-one years, then to testator's brother S., for life, and after his death to the use of the issue of his body; and in default of issue, or in case none of

(*a*) [Doe dem. Wright *v.* Jesson, 5 M. & Selw. 95. 2 Bligh, 1, overruling Doe *v.* Goff, 11 East, 668. Doe *v.* Featherstone, 1 Bar, & Adol. 944.] (*b*) Doe *v.* Cooper, 1 East, 229
(*c*) Pearson *v.* Vickers, 5 East, 548. Wight *v.* Leigh, 15 Ves. 564.

such issue live to attain the age of twenty-one years, then to another brother and his issue in the same manner. The Court of C. P. held that the daughter took only an estate for life. (*a*)

55. Where an *estate for life* is devised to a person, with a *subsequent devise to his heirs*, or to the *heirs of his body*, the devisee will take an estate in fee or an estate tail; in consequence of a rule of construction which shall be stated hereafter. (*b*)

(*a*) Merest *v.* James, 1 Brod. & Bing. 484.

(*b*) *Vide* ch. 14.

CHAP. XIII.

CONSTRUCTION—WHAT WORDS CREATE AN ESTATE FOR LIFE, A TERM FOR YEARS, AND UNCERTAIN INTERESTS.

SECT. 1. *Where an Express Estate for Life is given.*
5. *Though a Power of Disposing be added.*
9. *A Devise without any Words of Limitation.*
28. *Though charged with a Payment.*
36. *Or an Annuity during the Life of the Devisee.*
SECT. 38. *The word* Estate *when descriptive of local situation.*
41. *The word* Hereditament.
42. *Where the General Intent is to give a Life Estate, though words of limitation used.*
47. *What Words create a Term for Years.*
49. *And uncertain Interests.*

SECTION 1. IT has been stated in the preceding chapter, that *although an express estate for life only be devised* to a person, yet if the *general intent* of the testator *require that the issue of the devisee for life should take by descent from him*, the courts have enlarged his estate into an *estate tail;* but where the manifest *general intent* of the testator *does not require* that the estate for life expressly given should be enlarged into an estate tail, the devisee will *only take an estate for life:* [1] in consequence of the rule that *expressum facit cessare tacitum:* and it is observable that the doctrine of effectuating the general intent, in contradiction to the particular intent, is of modern date. (*a*)

(*a*) See *ante*, ch. 12, s. 53.

[1] In the following cases, the general intent of the testator was deemed not to require an enlargement of the estate expressly given for life: Bool *v.* Mix, 17 Wend. 119; Shriver *v.* Lynn, 2 How. S. C. Rep. 43; Nason *v.* Blaisdell, 17 Verm. 216; M'Lellan *v.* Turner, 3 Shepl. 436; Zimmerman *v.* Anders, 6 W. & S. 218; Davison *v.* Gates, 11 Pick. 247; Findlay *v.* Riddle, 3 Binn. 139; Dunwoodie *v.* Reed, 3 S. & R. 435; White *v.* Woodbury, 9 Pick. 136; Smith *v.* Carr, 1 Hen. & Munf. 240; In re Saunders, 4 Paige, 293; Parr *v.* Swindels, 4 Russ. 283; Monk *v.* Mawdsley, 1 Sim. 286; Lushington *v.* Sewell, 1 Sim. 435; Barnacle *v.* Nightingale, 14 Sim. 456; Festing *v.* Allen, 5 Hare, 573; [Pratt *v.* Leadbetter, 38 Maine, (3 Heath,) 9; McCorkle *v.* Black, 7 Rich. Eq. (S. C.) 407; Haralson *v.* Redd, 15 Geo. 148; Cook *v.* Walker, Ib. 457.]

2. A person devised to his eldest son for life, remainder to the sons of his body lawfully begotten, and if they aliened, that his daughters should have the same estate, remainder to his right heirs. It was resolved that the eldest son had but an estate for life, and that his son should have it by purchase; because it was expressly limited that he should have it only for life. (*a*) [1]

*Lord Hale says, the words in this case were; "*to his* *255
eldest son for life, et non aliter," and that it was held to be an estate for life by reason of the words *non aliter*. (*b*)

3. A person devised his estate to trustees and their heirs, in trust for Popham for life, remainder to his first and other sons successively in tail male; "*and for want of issue male of Popham*," to another person. Afterwards the testator by a codicil, reciting that he had by his will given the premises to Popham and the heirs male of his body, willed that if the estate should determine, and Popham should die without issue male, then his estate to be disposed of in a particular manner. (*c*)

The questions were, I. Whether the words of the will, viz. "*for want of issue male of Popham*," did not by implication give an estate tail to Popham. II. Whether admitting the words in the will did not give an estate tail, the codicil, reciting that the testator had by his will devised the premises to Popham and the heirs male of his body, would not so far influence and explain the will, as to make it an estate tail, though it was not so before.

It was resolved unanimously that Popham had only an estate for life by the will; and that the same was not enlarged or altered by the codicil; for there being an express estate given to Popham for life, with remainder to his first and every other son, &c., the words, "*if Popham should die without issue male*," should not enlarge his estate to an estate tail, in regard these amounted only to make an estate tail by implication; and words of implication could never destroy what was before expressed; so that the words, if he should die without issue male, could mean no more than if he should die without sons.

4. A testator devised all his freehold estates to trustees, in trust to convey the same to Ewer Edgley for life, remainder to

(*a*) 1 Roll. Ab. 837, pl. 13. (*b*) 1 Vent. 231. (*c*) Bamfield *v.* Popham, 1 P. Wms. 54.

[1] See also Den *v.* Crawford, 3 Halst. 90; Bennett *v.* Morris, 5 Rawle, 9; Findlay *v.* Riddle, 3 Binn. 139; Smith *v.* Carr, 1 Hen. & Munf. 240; In re Sanders, 4 Paige, 293.

trustees during his life to preserve contingent remainders, remainder to his first and other sons in tail male; remainder to his daughters in tail general, as tenants in common; with power to E. Edgley to make a jointure; and if he should die without issue, then he devised the premises over. (*a*)

It was contended that E. Edgley, by virtue of the words, "*if he die without issue of his body*," should have an estate tail in the premises; to which it was answered, that here was an express estate for life limited to E. Edgley, and the words,
256* "*if he *should die without issue*," being only words of implication, would not merge and destroy an express estate for life.

The Court exploded the notion that words of implication should not turn an express estate for life into an estate tail; and said that if I devise an estate to A for life, and after his death without issue, then to B, this will give an estate tail to A, according to Sonday's case; but here being a limitation, upon E. Edgley's death, to his sons, and after to his daughters, the following words,—if E. Edgley should die without issue,—must be intended, if he should die without *such* issue. And as to what had been urged, that unless these words were to create an estate tail in E. Edgley, his son's daughters could not take; it did not appear that the testator intended E. Edgley's son's daughters should take, for he might think that on E. Edgley's dying without issue, his name and family would be determined; for which reason he might limit it over to the daughters of E. Edgley himself. Besides, the son of E. Edgley would be tenant in tail, and when of age might, by docking the entail, give the premises to his daughters. (*b*)

5. Although a devise to a person generally, *with a power to give and dispose of the estate devised as he pleases*, creates an estate in fee simple; yet where an estate is devised to a person *expressly for life*, with a power of disposal, the devisee will *only* take an *estate for life*, with a power to dispose of the reversion. (*c*)[1]

(*a*) Blackborn *v.* Edgley, 1 P. Wms. 600. (*b*) *Ante*, c. 12.
(*c*) Ch. 11, s. 10. (Stevens *v.* Winship, 1 Pick. 318. Jackson *v.* Robins, 16 Johns. 537. Armstrong *v.* Armstrong, 3 Am. Law Journ. 49, N. S.

[1] On the question, whether a devise of lands, "*freely to be possessed and enjoyed*," gives

6. A person having two daughters, devised lands to his wife for life, and at her decease, she to give the same to whom she pleased. The wife granted the reversion to a stranger, and committed waste; the two daughters brought an action of waste. (*a*)

It was held, that by the devise, the wife had but an estate for life, with an authority to give the reversion to whom she pleased; and her grantee would be in by the will: for the testator had given his wife an express estate for life, and therefore she could not by implication have any greater estate: but if an express estate had not been given to the wife, by the other words, an estate in fee simple had passed. (*b*)

7. J. Tomlinson devised lands to his wife for her life, and then to be at her disposal; provided it was to any of his children, if living; if not, to any of his kindred that his wife should please. (*c*)

* It was resolved by the Court of K. B. upon a writ of *257 error from the C. B., that the wife had but an estate for life, with a power of disposing of the inheritance. And Lord Ch. J. Parker said, the difference was where a power was given with a particular description and limitation of the estate, as here,

(*a*) Anon. 3 Leon. 71. 4 Leon. 41.
(*b*) Daniel *v.* Upton, Noy, 80. (*c*) Tomlinson *v.* Dighton, 1 P. Wms. 149.

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a fee simple or only a life-estate, the decisions appear, at first view, to be conflicting. But by the weight of authority, it would seem, that the words are too uncertain, of *themselves*, to raise a fee, though they may be aided by other circumstances. See Wright *v.* Denn, 10 Wheat. 241–245; Wheaton *v.* Andress, 23 Wend. 452; Goodright *v.* Barron, 11 East, 220; *Supra*, ch. 11, § 10, 51, note. In Loveacres *v.* Blight, Cowp. 352, in which they were held to pass a fee, there was the additional circumstance of a charge on the estate.

A devise to trustees to sell, and pay the annual income to A, during her life; held a good devise during the life of A. Young *v.* Grove, 4 M. G. & S. 668. [A devise to a son, "of the land he is now in possession of, to him during his natural life, to improve, and then to his heirs after him, for their sole right," was held to create an estate for life, there being no evidence in the rest of the will of an intention to give an estate of inheritance. Pratt *v.* Leadbetter, 38 Maine, (3 Heath,) 9. See also Fay *v.* Fay, 1 Cush. 93.

A testator devised and bequeathed to his wife for her life, the interest or rent of his house, and all his other goods and effects whatsoever, and after the death of his wife, he gave and bequeathed the house and all his goods and effects to his four children, to be equally divided between them. Held, that the children took an estate for life only in the house. Harding *v.* Roberts, 29 Eng. Law and Eq. 451. See also Fairman *v.* Beal, 14 Ill. 244.]

and where generally, as to executors, to give or sell; for in the former case the estate limited being express and certain, the power was a distinct gift, and came in by way of addition; but in the latter, the whole was general and indefinite; and as the persons intrusted were to convey a fee, they must consequently, and by a necessary construction, be supposed to have a fee themselves. (*a*)

8. John Russell by his will gave a legacy of £1,000 to his son Richard, and an estate in fee to a nephew; and then directed his executrix to lay out £2,000 of his personal property in the purchase of freehold estates, within twelve months after his decease. The estate so to be purchased, together with four messuages in Johnson's-court, Fleet-street, and elsewhere, and the reversion of others, (describing them all,) and all his leasehold estates, he gave to his wife Rebecca, for her life, and from and immediately after her decease, to his son Richard and his issue lawfully begotten, or to be begotten, to be divided among them as he should think fit; and in case he should die without issue, he directed that all, as well his present freehold and leasehold, as the estates directed to be purchased, should be sold, and the money arising from the sale should be divided among the children of his brother Russell, and of his sisters Willis and Parks, equally. There was a subsequent direction that no part either of his present freehold and leasehold, or of the estate so directed to be purchased, should be sold during the lives of his wife and son. All the rest, residue, and remainder of his property and effects whatsoever and wheresoever, after payment of debts, legacies, and funeral expenses, he gave to his wife for her own use and benefit, forever, and appointed her his sole executrix. The wife enjoyed under the will for her life, and after her death the son enjoyed for his life, and died without having had issue. (*b*)

Upon a suit in Chancery to establish the will, one of the questions was, whether Richard Russell, the son, took an estate tail, or for life only, under the will.

Lord Thurlow said, it was clear to him that the testator intended, and he thought had pretty plainly expressed, a con-
258* tingency, *with a double aspect: in one case, to the children of the son; in the other, to the other persons pointed

(*a*) Hearle *v.* Greenbank, tit. 32, c. 13, S. P. (*b*) Hockley *v.* Mawbey, 1 Ves. 143.

out: to the children of the son in one way, to the other parties in another, viz., by settling it so as to distribute it among the great numbers of persons who might come within that description. The limitation to the son and his issue would be an estate tail, and perhaps the aptest way of describing an estate tail according to the statute; but it was clear he did not intend it to go to them as heirs in tail, for he meant they should take distributively, and according to proportions to be fixed by the son. It had often been decided, in other cases besides those mentioned at the bar, that where there was a gift in that way, the parties must take as purchasers, for there was no other way for them to take. The immediate consequence of this was, that Richard Russell could only take for life; and the consequence of that was, that this was a gift to the wife for life, then to the son for life, and after to his issue, in such distributive shares as he should appoint. It was then said that this might be interpreted to be a gift to the son in tail, with a power annexed to raise a future use upon it, of the description mentioned. As to that, he apprehended that in case there had been children of the son, it was not intended to be left in his power to determine whether he should or should not consider it as his own, and raise a future use if he pleased; but the disposition gave an interest to his children, and a title to insist upon an estate in the premises so given, at all events; and then the son had no authority, but as to the proportions in which they were to take; but not to choose whether any thing should be given to them or not. Then the effect was like all other gifts to persons in remainder capable of being divided, but if not, equally; and that was the necessary consequence of the supposition he mentioned before, that he intended to vest an interest in the children of his son, independently of the son, except as to the proportions; and that even so as that they should not be illusory. It was observed that the word "*issue*" would extend to grandchildren or any other degree of kindred, however remote; he thought it would be so, but only in this point of view, as a description of the objects among whom the power of the son was to obtain, to make such partition as he should think fit; and whosoever they were, they must be in existence during the life of the son, and he must have made it during his life; if so, it was of no consequence how they were described; for if

259* it vested *in him, it was of no consequence to say they were not the immediate descendants of the son. It was an estate devised upon two alternative contingencies; one, that there were objects capable of taking under the first limitation; another, that there were none such, but that there were objects capable of taking under the second. As to its being an estate tail by implication, it was contrary to reason and to common sense to impute that intention to him, if only arising from his not having made a special devise of the estate in that form. The estate he was directing to be sold, and the estate supposed to be given to the son in tail, were the same; and if so given, it could not be sold by this power, and did not come within the range of what he had before directed; it was plain, therefore, he did not intend an estate tail; and he was himself clear upon that point. Decreed an estate for life. (*a*)

9. Where *no words of limitation* are added to a devise, and there are *no other words* from which *an intention* to give an estate of inheritance can be collected, the devisee will take *only an estate for life.*[1]

10. If a man devise in this manner:—"I devise Blackacre to my daughter F. and the heirs of her body begotten. *Item*, I devise unto my said daughter Whiteacre." The daughter shall have but an estate for life in Whiteacre; for the word *item* is not so much as *in the same manner.* But if a person devise Blackacre to one in tail, and also Whiteacre, the devisee shall have an estate tail in Whiteacre also; for this is all one sentence,

(*a*) Reid *v.* Shergold, 10 Ves. 370.

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[1] In most of the United States, a devise, without words of limitation, or declaration of a different intent, conveys all the interest which the testator had in the premises. See *supra*, ch. 11, § 2, note.

A devise of "*all the rest of my lands*," without other words, or any other devise of real estate, was held to convey only an estate for life. Wright *v.* Denn, 10 Wheat. 204, 232–239.

The rule in the text is recognized in Cook *v.* Holmes, 11 Mass. 528; Wright *v.* Denn, *supra;* Steele *v.* Thompson, 14 S. & R. 84; Barnett *v.* Barnett, 15 S. & R. 72; Jackson *v.* Wells, 9 Johns. 222; Jackson *v.* Embler, 14 Johns. 198; Hall *v.* Goodwyn, 1 N. & McC. 383; Witherspoon *v.* Dunlap, 1 McC. 546; Clayton *v.* Clayton, 3 Binn. 476; Jackson *v.* Bull, 10 Johns. 148. [See also, Wight *v.* Baury, 7 Cush. 105; Reeder *v.* Spearman, 6 Rich. Eq. (S. C.) 88.]

and so the words which make the limitation of the estate go to both. (*a*)

11. A person devised in these words:—"I give and bequeath to H. my farm and lands at R., to him, his heirs and assigns forever. And I also give and bequeath to the said H. my farm and manor of E." (*b*)

Lord Eldon said, the only question upon this devise was, whether the word *also* had precisely the same operation as the addition of the words, his heirs and assigns forever, in the devise of the other estate immediately preceding; and it seemed to him that all the old rules against disinheriting an heir, except by plain words or necessary implication, were gone, if such a construction was to prevail. Decreed an estate for life.[1]

12. One Hawkins being seised in fee of three houses, devised them to his wife for life, the remainder of one to Robert, his son and his heirs, the remainder of another to Christian, his daughter *and her heirs, and of the third to Joan, his *260 daughter and her heirs; and did further will, that if any of them died without issue, then the survivors should enjoy *totam illam partem*, equally divided between them. (*c*)

It was resolved, that the survivor only took an estate for life in the share of the others.[2]

13. A person having three sons, B, C, and D, devised lands to B, in tail, remainder to C, in fee, and other lands to C, in tail, remainder to D, in tail; and then other lands to D, in fee. He afterwards said, "*Item*, I give Blackacre to my said son D; *item*, I give to my said son D, Whiteacre. Also I will that all bargains, grants, &c., which I have from J. S. my son D shall enjoy, and his heirs forever; and for lack of heirs of his body, to my son C, forever." (*d*)

(*a*) 1 Roll. Ab. 844. 1 Mod. 100. (Conoway *v.* Piper, 3 Harringt. 482.)
(*b*) Paice *v.* Archb. of Canterbury, 14 Ves. 364.
(*c*) Pettywood *v.* Cooke, Cro. Eliz. 52. 2 Leon. 129.
(*d*) Spirt *v.* Bence, Cro. Car. 368. Vaugh. 262.

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[1] In this case, there was a residuary devise; and it does not appear in the report, that H. was the testator's heir.

[2] This case was doubted by Ld. Ellenborough, in Bebb *v.* Penoyre, 11 East, 163. And see Paris *v.* Miller, 5 M. & S. 408; Doe *v.* Fawcett, 3 Man. Gr. & Sc. 283.

It was agreed by all the Judges, that the bargains and grants, &c. only were entailed; and that D had but an estate for life in Blackacre and Whiteacre.

14. A person devised a house to his sons James and Thomas, and the heirs of their bodies, in equal moieties; and then added, "but my will and mind is, that if any of my said children shall die before twenty-one, or unmarried, the part or share of him or her so dying shall go over to the survivors." (*a*)

Lord Holt was of opinion, that Thomas, dying unmarried, his moiety went over to the survivor, and that by the devise over, only an estate for life passed. (*b*)

15. A person devised a copyhold estate to his daughter Jane, her heirs and assigns for ever; but in case his said daughter died before she attained the age of twenty-one years, and had no issue, then his will was, that his nephew, J. Hardisty, should have his said copyhold lands and tenements. (*c*)

The Court was clearly of opinion, that J. Hardisty took only an estate for life: that the testator by his devise to Jane plainly understood the force of words of limitation; and if he had intended to give his nephew more than an estate for life, he knew how to have done it: that there were no express words in the will that gave the nephew a fee, nor any manifest intention to do so, or to disinherit the heir at law.

16. A will began with these words:—"As touching the disposition of such temporal estate as it has pleased God to bestow on me." And then the testator proceeded to give his
261* to *his son, S. Russell, and after his death then to the two sons of Samuel, named Thomas and William; and gave a legacy of one shilling to the husband of his heir at law. (*d*)

It was resolved by the Court of Exchequer, that Thomas and William took only estates for life.

17. B. C. being seised and possessed of freehold and leasehold property, lying contiguous, and demised together, devised to his wife all his freehold and leasehold messuages, &c. and all his estate and interest therein, for and during her natural life; and after her decease he devised the said messuages to his sisters-in-

(*a*) Woodward *v.* Glasbrook, 2 Vern. 388.
(*b*) Cook *v.* Cook, *ante*, c. 10.
(*c*) Roe *v.* Holmes, 2 Wils. R. 80.
(*d*) Right *v.* Russell, cited 2 Doug. 761.

law, M. S. and M. B., as tenants in common; but in case his mother should give any disturbance to his wife, then his will was, that the same should go to his kinsman W. B., his heirs and assigns forever; and charged his estate with the payment of all his just debts, to be paid out of the yearly rents of his estate by his said wife. (*a*)

Lord Mansfield said, there were no words of limitation added to this devise to the sisters-in-law; and therefore it was clear, by the rule of law, that it was only an estate for life; unless it could be found from the whole of the will taken together, and applied to the subject-matter of this devise, that the testator's intention was to give a fee.

Judgment that the sisters-in-law took only an estate for life.

18. A person devised all his real and personal estate to his wife for her natural life, and at or immediately after her decease, he gave his son Paul all that his land lying and being in Dudley, and gave to each of his grandchildren (one of whom was his heir at law) a legacy of five shillings. (*b*)

The Court was of opinion, that Paul took only an estate for life.

19. John Gaskin began his will thus: "As to all such worldly estate as God has endued me with." He then gave all that his freehold messuage and tenement lying in G. to his three nephews, equally to them; and gave ten shillings to his heir at law. (*c*)

Lord Mansfield said, it was settled in devises, as well as in deeds, that if no words of limitation were added, the devisee could only take an estate for life, because the law implied an estate for life only, where there were no words of limitation: but as there were no technical words necessary in a will, if the testator made use of what was tantamount, as if he said, I give to * such a one in fee simple, or all my estate, that *262 would carry all his interest in the land devised. But there must be words in the will to control the rule of law, which he believed in a variety of cases thwarted the intention of the testator. He suspected extremely, that in this very case the testator meant to give his nephews a fee in the premises in question;

(*a*) Roe *v.* Blackett, Cowp. 235.
(*b*) Roe *v.* Bolton, 2 Black. R. 1045. 2 Doug. 761. (*c*) Denn *v.* Gaskin, Cowp. 657.

for he had no other landed property. He made them residuary legatees of his personalty, and gave a disinheriting legacy to his heir at law, agreeable to the vulgar notion taken from the Roman law, that an heir is cut off with a shilling. But the single question was, whether the Court could find any words in the will to take this case out of the rule of law; if they could not, it must be adhered to. He said it was impossible to find words in this will sufficient to control the rule of law. There were no words that could connect the devise of the lands in question with the introduction, so as to pass the whole interest; therefore the devisees could only take an estate for life. Judgment was given accordingly.

20. W. Sparrowhawk devised as follows:—"For those worldly goods and estates wherewith it has pleased God to bless me, I give and dispose of the same in manner following." Then gave one shilling to his heir at law; and after giving other legacies, came this clause—"And I do give and devise unto Susan my said wife, her heirs and assigns forever, all my lands lying in the parish of A. And I give and bequeath to my loving wife aforesaid all my lands, tenements and houses lying in the parish of Chipping Norton." The question was, whether the last-mentioned premises were devised to the widow in fee, or for life. (*a*)

Lord Mansfield.—"I verily believe that almost in every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. *All my estate*, or *all my interest*, will do; but *all my lands lying in such a place* is not sufficient; such words are considered merely as descriptive of the local situation, and only carry an estate for life; nor are words sufficient to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else. I have no doubt but
263* the testator's *intention here was to disinherit his heir at law, as well as in the case of Denn *v.* Gaskin. But the only circumstance of difference between that case and this, and

(*a*) Right *v.* Sidebotham, 2 Doug. 759. [Pocock *v.* Bp. of Lincoln, 3 Br. & Bing. 27. Doe *v.* Gwillim, 5 B. & Adol. 122.]

which has been relied on as in favor of the defendants, if the testator had any meaning by it, (which I do not believe he had,) rather turns the other way, because he uses different words in devising different parts of his estate. I think we are bound by the case of Denn *v.* Gaskin." Judgment that the widow took only a life-estate in the last-mentioned premises. (*a*)

21. T. Nash devised lands to S. Nash for life, remainder to trustees to preserve contingent remainders; remainder to the first and other sons of S. Nash, and the heirs male of his and their bodies; and for default of such issue, to the use and behoof of all and every the daughter and daughters of the body of the said T. Nash; and for default of such issue, to the use of the right heirs of the said T. Nash forever. T. Nash had a daughter named Jane; and the question was, whether she took an estate for life or an estate tail. (*b*)

Lord Mansfield.—"This question does not admit of much argument, nor of cases to be cited; for every case must depend upon its own circumstances. The rule of law is clear, that a grant by words of purchase without further limitation, enures for life only. When wills came to be in vogue, it pleased the Judges to consider them in their construction, with analogy to rules of law respecting deeds, and not with analogy to the Roman appointment; and therefore they held that such a grant enured for life only. There is hardly an instance where the words of a devise are restrained to a life-estate only, in which the intention of the testator is not contravened; for common men are ignorant of the difference between land and money. This being so, the Courts have been astute to find out, if possible, from other parts of the will, the intention of the testator; the question then is, whether there be enough here, on the face of the will, for we must not go into conjecture. I conjecture that this was a blunder, and that another limitation was intended, but I do not know of what nature, whether to heirs general or special. Is there then any authority for supplying the defect, and making the will anew? Had the words been, if they die without issue, an estate tail would have been implied; but here the words are, for default of *such* issue, namely, that issue

(*a*) *Ante*, s. 19. (*b*) Denn *v.* Page, cited 1 Bos. & Pul. 261. 11 East, 603.

264* which is before mentioned. *The Court has no power to strike out the word *such;* and if they did, what are they to supply it with? are they to give an estate in tail general or in tail male? There is no intention therefore apparent on the will to direct the Court."

Judgment, that Jane took only an estate for life.

22. Sir R. Worsley being seised in fee of the premises in question, devised them to trustees, upon trust that they should stand seised thereof to the use of his grandson, the Earl of Granville, for life, remainder to his first and other sons in tail male; remainder to Lady Carteret for life; remainder to the first and other sons in tail male; and in default of such issue, "to the use of all and every the daughter and daughters of the body of the said Lady Carteret lawfully issuing, as tenants in common, and not as joint tenants; and in default of such issue, to the use and behoof of his own right heirs forever." (*a*)

Lady Carteret had one daughter, Lady Catherine Hay; and the question was, What estate she took under this devise?

A case was sent out of Chancery to the Court of K. B. for their opinion.

Lord Kenyon.—"The general rule which is laid down in the books, and on which alone courts can with any safety proceed in the decision of questions of this kind, is, to collect the testator's intention from the words he has used in his will, and not from conjecture. It is not necessary that any technical or artificial form of words should be used in a will; but we must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used. The objection then occurs in this case, *voluit sed non dixit.* The plaintiff's argument goes to show that the daughters took estates in tail general; but that could not have been the intention of the devisor, as no such estate is given in any part of the will, and the devisor has totally laid aside the daughters of the first devisee, and the daughters of his sons. The words here used, technically considered, only confer an estate for life on Lady C. Hay. It has been argued that we may presume an intention in the devisor, from other parts of the will, to give estates in succes-

(*a*) Hay *v.* Coventry, 3 Term R. 83.

sion to the daughters; but I cannot find any words in the will to warrant such a construction. If, indeed, the word *such* had not been introduced in this clause, we might perhaps have said that as issue is *genus generalissimum*, it should include all *the progeny; but here the word *such* is rela- *265
tive, and restrains the words which accompany it. The case is precisely similar to that of Denn *v.* Page: there the Court held that sufficient did not appear on the face of the will to warrant them in saying that an estate of inheritance was given to the daughter; that if it were left to conjecture, they might suppose that some mistake had been made in the limitation; but they could not determine on conjecture, nor put that in the devisor's mouth which he had not said." (*a*)

The certificate was, that Lady Catherine Hay took only an estate for life.

23. A person devised his estate to trustees and their heirs, until his nephew Thomas Foster should attain the age of twenty-one years, or die: and on his attaining twenty-one, to the said Thomas for life; and after the determination of that estate, to the trustees, to preserve contingent remainders; and after the decease of Thomas, to all and every the son and sons of the body of Thomas, severally, and successively one after another in priority of birth, &c.; and for default of such issue, to the trustees, until another nephew should attain twenty-one, and then to him in the same manner. (*b*)

Upon a case sent out of Chancery for the opinion of the Court of K. B., as to what estate Thomas Foster the nephew, and his eldest son took; that Court certified that they respectively took estates for life only.

24. Lord Mulgrave having an only daughter, and three brothers, devised his estate in trust for his first and every other son in tail male; "failure of such issue, to my brother Henry, and his first and every other son in tail male;" and so on to his two other brothers in the same words, and then to his daughter in the same manner; and concluded with these words, "in all the foregoing cases without impeachment of waste, other than wilful." Then after making a provision for his daughter to the

(*a*) *Ante*, s. 21. Doe *v.* Vaughan and Walker, 5 B. & Ald. 464.
(*b*) Foster *v.* Romney, 11 East, 594.

amount of £20,000, the will proceeded thus: "My will is, that the money lodged at Childs, to pay for the purchase of the Lyth rectory be applied to that purchase, as soon as Sir J. Sheffield can complete the title; and the renewals to be made by the tenant for life." It appears that Sir J. Sheffield held the rectory of Lyth for three lives, under the see of Canterbury. (*a*)

Lord Kenyon.—"The words '*first and every other son*,
266* *children*,' * or '*heir*,' may be taken to be words of limitation, where it is necessary to give them that construction in order to effectuate the intention of the testator, as in Robinson *v.* Hicks, though ordinarily speaking they are words of purchase: but in this case no doubt can be entertained respecting the devisor's intent. First he devised to his own first and every other son in tail male, and if he had no issue, then to his brother Henry and his first and every other son in tail male, &c. Now, if he had given instructions to a conveyancer to draw his will, and to make his brothers tenants for life, and their children tenants in tail, these are precisely the terms in which he would have given such instructions: and in construing wills we must take into consideration the short hints of the devisor, in order to discover his intention. To be sure, if the objection, *voluit sed non dixit*, had occurred, it could not have been got over; we could not have inserted words in a will which would have varied the construction of those used, even if we thought that the devisor had intended to have used them; but here the intention is sufficiently explained by the words which he has used; and great weight is also due to the subsequent words, which direct the renewal of the life-estate to be made by the *tenant for life;* for they can only apply to the devisor's brothers, since there was no other person who could take a life-estate under the will. In some of the cases, indeed, nice distinctions have been made, to whom the word heirs should be applied; but without entering into those niceties, because it is unnecessary in this case, where the devisor's intention may be collected from different parts of the will, I am clearly of opinion that, on the fair construction of the will, the present Lord Mulgrave only took a life-estate, with remainder in tail to his issue." (*b*)

25. [In Doe dem. Liversage *v.* Vaughan, the devise was to the

(*a*) Doe *v.* Mulgrave, 5 Term R. 320. (*b*) *Ante*, c. 12, s. 50.

testator's nephew, J. L., for life, and after his death to all and every the child and children of J. L. lawfully begotten or to be begotten, if more than one, as tenants in common, in equal shares, and for want of such issue to the testator's own right heirs. The Court of King's Bench decided, that J. L. took only for life, and after his death that his children took only estates for life as tenants in common. (*a*)

26. The later case of Parr *v.* Swindels very closely resembles the preceding, and received a similar decision. (*b*)

*27. In a more recent case the testator had bought the fee simple of a set of chambers in Albany, for 600 guineas, and being so seised, devised them by codicil to the Honorable Thomas Stapleton, in the following words: "I also bequeath to him my chambers in Albany, for which I paid 600 guineas, with all my furniture, except such articles as I may particularly except from this donation." The Court of K. B. held that the devisee took only a life estate.] (*c*) *267

28. It has been stated that a devise to a person, without any words of limitation, *charged with the payment of a gross sum of money*, or of debts or annuities, creates an estate in *fee simple*.[1] But it is laid down in Collier's case, that a devise to a person to the intent that *with the profits* he should educate his daughter, or *out of the profits* of the land pay to one so much, and to another so much, was but an *estate for life;* for he was sure to have no loss. (*d*)

29. W. Lock being seised in fee, and having several sons, and being bound in an obligation that £40 should be paid annually to his wife during her life, made his will, and thereby devised all his lands, by several clauses, to his several sons; and amongst

(*a*) 5 Bar. & Ald. 464. (*b*) 4 Russ. 283.
(*c*) Doe dem. Sewell *v.* Parratt, 3 Bar. & Adol. 469. Doe d. Norris *v.* Tucker, Ib. 473.
(*d*) 6 Rep. 16, a.

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[1] See *ante*, ch. 11, § 68, notes. If the charge is on the person of the devisee, the estate is enlarged into a fee; but if it is on the land only, it is an estate for life. See Denn *v.* Mellor, *infra*, § 33; Jackson *v.* Bull, 10 Johns. 148; Van Alstyne *v.* Spraker, 13 Wend. 578.

But where the devise was to A., on condition that he should serve the testatrix as a coachman, so long as she should require, which condition was unknown to the devisee during her life, it was held, that he took only an estate for life. Farrar *v.* Ayres, 5 Pick. 404.

others, he devised the lands in question to his sons Michael and Henry; and added this clause: "*Item*, all the houses and lands which I have given between my sons, is to this purpose, that they all shall bear part and part alike, going out of all my houses and lands, towards the payment of my wife's £40 *per annum* during her life, which I am bound to pay." (*a*)

The Court resolved that an estate for life only passed by this devise, for it was not devised, paying a sum in gross, but that every one should pay out of his part towards the £40 to his wife; which was *quasi* an annual rent out of the profits of the land, and no sum in gross; and therefore no fee was given.

30. J. Toby devised all his lands and goods, after his debts and legacies paid, to his children, R. and M. Toby, equally to be divided between them. (*b*)

The Court resolved that only an estate for life passed; for although in the devise the lands and goods were coupled together, and it was a devise forever of the goods; yet for the land, there being no words to give the inheritance, only an estate for life passed. And although it was objected that the devise of the lands was, after his debts and legacies paid, yet that did not enlarge it.

268 * * 31. A person gave all his lands, tenements, and messuages whatsoever, after debts and legacies paid, and funeral expenses were discharged, to J. M. (*c*)

It was said by Mr. Fortescue, M. R., that where a gross sum was to be paid out of the lands devised, it gave a fee to the devisee of those lands; but here the debts were not at all events charged upon the real estate, but *only contingently*, if the personal estate should be deficient; and therefore did not come up to the cases cited of a gross sum to be paid out of land: and consequently gave no more than an estate for life to the devisee.

32. It has been laid down in two modern cases, that where the payment of a gross sum of money, or of debts and legacies, is *charged on the estate* devised, and *not on the devisee*, such a charge will not operate so as to give the devisee an estate in fee; and therefore, if no words of limitation are added, he will take no more than an estate for life.

(*a*) Ansley *v.* Chapman, Cro. Car. 157. (*b*) Dickens *v.* Marshal, Cro. Eliz. 330.
(*c*) Merson *v.* Blackmore, 2 Atk. 341. (Jackson *v.* Harris, 8 Johns. 141, 146.)

33. A person devised as follows: — "I give and devise unto N. Lister all that my customary estate, &c. All the rest of my lands, tenements, and hereditaments, either freehold, or copyhold, whatsoever, and wheresoever; and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts and funeral expenses, I give, devise, and bequeath the same unto my wife Sissily Carr;" and appointed her sole executrix. (*a*)

The question was, whether Sissily Carr took an estate in fee, or only for life.

Lord Kenyon said, where a devisee is directed to pay an annual rent-charge or a solid sum to another person, out of the estate devised, it had been properly decided that the devisee should take a fee, because he might be a loser unless the estate in his hands were at all events sufficient to enable him to bear those charges. Where a sum of money was given, it might be payable before the rents became due; and where an annual charge was made on the estate, it might continue beyond the life of the devisee; and therefore it was necessary in both those cases that the devisee should have a permanent fund. That this case had been compared to that of Doe *v.* Richards; but there the words were, my legacies and funeral expenses being *thereout* paid; which imported that those sums were to be paid by the devisee out of the interest given to her; and if she had died immediately *after the devisor, and had only taken *269 a life-estate, the fund out of which she was to bear those charges which might have failed; the Court was therefore compelled to make that decision, and he was now perfectly satisfied with it. But in this case the words of the will were, "*after payment of my just debts and funeral expenses.*" Now supposing the devisor had, in the beginning of the will, charged his debts and funeral expenses on his real estate, and had then, after a series of limitations, devised to his wife in the words here used; it could not have been contended that such a charge on the real estate would have passed the fee to his wife: and if not, the place in which the same words were introduced could not vary the question. He admitted that the real estate was charged with the payment of debts and funeral expenses, if the personalty

(*a*) Denn *v.* Mellor, 5 Term R. 558.

was not sufficient for that purpose; but there were no words, charging the estate in the hands of the wife with the payment of those debts. This, therefore, essentially differed the present case from that of Doe *v.* Richards; for there the debts were to be paid by the devisee, and were a charge on the estate in his hands; whereas, here, the debts were no charge on the devisee. (*a*)

Judgment was given that Sissily Carr took only an estate for life.

On a writ of error in the Exchequer Chamber, this judgment was reversed, upon the ground that the words, all the *rest* of the real estate, created an estate in fee. (*b*)

A writ of error was then brought into the House of Lords, where the following question was put to the Judges: What estate the devisee, Sissily Carr, took in the premises in question? to which the Lord Ch. B. of the Exchequer delivered their unanimous opinion, that Sissily Carr took an estate for life; whereupon the judgment of the Court of Exchequer Chamber was reversed, and that of the Court of King's Bench affirmed. (*c*)

34. Previous to the hearing of this case in the House of Lords, the following case was determined by the Court of K. B., in conformity to the doctrine laid down by that Court in the preceding case.

35. A person made his will in these words: "As to what real and personal estate it hath pleased Almighty God to bless me with, I give and dispose of the same as followeth: first, my will is that all my debts and funeral expenses be justly paid off
270* and discharged * out of my personal estate; and if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever, situate, lying and being, &c., unto W. Allen." And the question was, what estate passed by these words. (*d*)

Lord Kenyon said, that the debts were not at all events charged upon the real estate, but *only contingently*, if the personal estate should not be sufficient, and therefore did not come up to the cases cited, of a gross sum to be paid out of the land

(*a*) *Ante*, c. 11, § 68.
(*b*) 1 Bos. & Pul. 558. (See 10 Johns. 152, per Kent, C. J.)
(*c*) 7 Bro. Parl. Ca. 607. 2 Bos. & Pul. 247.
(*d*) Doe *v.* Allen, 8 Term R. 497. (Jackson *v.* Harris, 8 Johns. 141, 146.)

devised, and consequently the words gave no more than an estate for life to the devisee. Judgment was given accordingly.[1]

36. It has been stated, in a former chapter, that a devise of land charged with an annual payment to a third person for life, creates an estate in fee simple; but it is otherwise where the *annual payment is only to continue during the life of the person to whom the land is devised.*

37. A person devised lands to D. his wife, yielding and paying therefor yearly, during her natural life, to the right heirs of his father, forty shillings, &c. (*a*)

The Court was of opinion that D. took only an estate for life.

38. It has also been already stated that the word "*estate*" will create a *fee simple*, when it appears to have been *used by a testator to denote all his interest* in the lands devised; but where it appears to have been used as merely *descriptive of the local situation* of the lands devised, it will then pass no more than an *estate for life.* (*b*)

39. Upon an appeal to the King, in Council, from a decree made in the Island of Antigua, the case was: A person having real and personal estate, gave and bequeathed one third part of all his estate whatsoever to his wife Ann; and devised to his son John, and to his heirs, two thirds of all his real and personal estate. (*c*)

It was determined by Lord Ch. J. Raymond, Sir J. Jekyll, and Lord Ch. J. Eyre, that the wife took only an estate for life; the word estate being rather a description of the thing itself, than of the testator's interest in it; and by the next clause it appeared, that where the testator intended to give a fee, there he took care to add the word heirs to the word estate.

*40. A person having devised his estate to his nephew Thomas Hutton and his heirs, added these words:— *271

(*a*) Ager *v.* Pool, 3 Dyer, 371, b.
(*b*) *Supra*, ch. 11, s. 25. (Lambert *v.* Paine, 3 Cranch, 134, per Patterson, J.)
(*c*) Chester *v.* Painter, 2 P. Wms. 335.

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[1] See also, Doe *v.* Baines, 2 C. M. & R. 23; 5 Tyr. 655; Doe *v.* Roberts, 7 M. & W. 382; Doe *v.* Wrighte, 2 B. & A. 710; Clarke *v.* Clarke, 1 C. & M. 39; 3 Tyr. 120; Mackie *v.* Mackie, 9 Jur. 753.

"And if my said nephew shall have no issue male, then my said estate shall go to the daughter or daughters of my brother Richard, and to the daughter or daughters of my brother Matthew, remainder to his right heirs." (*a*)

The question was, whether by the devise to the daughters of Richard and Matthew, an estate in fee or for life passed.

The Court was clearly of opinion, that an estate for life only passed to the daughters: for, as it was argued, that although in wills the word "*estate*" was sufficient to carry a fee, yet in this case, where the consequence was the disinheriting an heir at law, a fee should not pass thereby, unless the intent of the testator was very plain and apparent for that purpose. That the intent was not so apparent as to force the Court to put such a construction on the devise to the daughters as was insisted on; but on the contrary, from the contexture of the whole will, it seemed plain that the word "*estate*" was always, and particularly in the devise in question, used as descriptive only, and synonymous with "*lands;*" so that there would be putting a force on it to make it carry a fee. And besides, the devise over to the testator's heirs showed that he thought he had further interest to dispose of, after the devise to the daughters, to whom he did not seem to intend so much as an estate tail. (*b*)

Judgment that the daughters of Richard and Matthew took only estates for life.†

(*a*) Rogers *v.* Briggs, Andrews, R. 210. (*b*) Goodright *v.* Barron, 11 East, 220.

[† In other cases besides those cited by the author, the general import of the word "*estate*" has been confined by expressions referring to the local situation of the property, but the inclination of the Courts in later decisions has been to give the word "*estate*" its full effect, except in instances where the expressions accompanying that word have met with a contrary construction; and indeed instances are not wanting where the same expressions which in earlier cases have limited the operation of the word "*estate*," in later authorities have been held not to restrain its general import. The following are some of the cases in which the word "*estate*" although coupled with words of locality has been held to pass a fee. My estate at, of, or in A., Price *v.* Gibson, 2 Eden, 115; Chichester *v.* Oxenden, 4 Taunt. 176; 4 Dow, 92; Uthwatt *v.* Bryant, 6 Taunt. 317. My estate called A., in the parish of B., Roe *v.* Wright, 7 East, 259. All my estate I bought of A., Bailis *v.* Gale, 2 Ves. S. 48. My freehold estate consisting of thirty acres, situate at A., in the county of B., now in the occupation of C., Gardner *v.* Harding, 3 I. B. Moore, 565, overruling it would seem Pettiward *v.* Prescott, 7 Ves. 541; see also Paris *v.* Miller, 5 M. & Selw. 408. All my real and personal estate whatsoever (that is to say) my lands and buildings at A., in the county of B., upon my

*41. The word "*hereditament*" only creates an estate for life, in a will; for it does not denote the measure or quantity of the estate; as it has a proper and appropriate meaning, and extends to annuities, advowsons in gross, and many other things. (*a*) † *272

42. Although an estate be devised to a person and the heirs of his body, yet if the *general intent* of the testator can only be carried into effect by construing the words "*heirs of the body*" to be *words of purchase*, the devisee will only take an estate for life.[1]

43. A person devised to his son B. J., and his heirs lawfully to be begotten, that is to say, to his first, second, third, and every son and sons lawfully to be begotten of the body of the said B. J., and the heirs of the body of such first, second, third, and every son and sons successively, lawfully issuing; and in default of such issue, then to his right heirs forever. (*b*)

It was resolved that B. J. took only an estate for life, the word "*heirs*" being fully explained by the subsequent words, to be a word of purchase.

44. Lands held in gavelkind were devised to Ann Cornish and

(*a*) Doe *v.* Mellor, *supra*, § 33. (*b*) Lowe *v.* Davies, 2 Ld. Raym. 1561.

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estate, Denn *v.* Hood, 7 Taunt. 35. All my lands, &c. to A. for life, and after his decease my said estates to B., Roe *v.* Bacon, 4 M. & Selw. 366. As to the rest of my estate my two houses at A. and B., that in A. to my daughter, Esdaile *v.* Gall, 1 Russ. & M. 540; S. C. 8 Bing. 328, overruling the decision of the Master of the Rolls upon the same devise. But in the latter case of Doe *v.* Tucker, 3 Bar. & Adol. 473, very nearly resembling Gall *v.* Esdaile, the Court of K. B. decided that an estate for life only passed by the words of the will. In Doe *v.* Tucker, the testator devised to his wife his freehold *estate* called P., during her life, and, after a bequest of stock, goods, and chattels to his wife for life, and a legacy of £10 to his son and heir Richard, added, *Item*, all the above bequeathed *lands*, goods, and chattels, after the death of my wife, I give and devise in manner following: unto my son *Richard*, unto my son *Thomas*, unto my son *Robert*, and unto every other of my children then in being, share and share alike equally to be parted between them. In Gall *v.* Esdaile, these were the introductory expressions, "as to such worldly estate as it hath pleased God to bless me withal, I give and dispose as followeth," but there were no such expressions in Doe *v.* Tucker; we have seen that these words in many cases have been brought in aid as evidence of the testator's intention not to die intestate as to any part of his property.]

† [The word *perpetual* as applicable to an advowson, is only descriptive of the thing devised, and not of the *quantum* of interest. 2 B. & B. 27; 1 Pri. 353. See Doe *v.* Wood, 1 B. & Ald. 518.—*Note to former edition.*

[1] See Findlay *v.* Riddle, 3 Binn. 155–160, per Yeates, J.

the heirs of her body lawfully begotten, or to be begotten, as well females as males, and to their heirs and assigns forever; to be equally divided, share and share alike, as tenants in common, and not as joint tenants. (*a*)

273* * Lord Mansfield said, that the devise could not take effect at all, but would be absolutely void unless the heirs of the body of Ann Cornish took as purchasers. The lands devised were gavelkind, and it was manifest the testator did not mean that his estate should go in a course of descent in gavelkind, for he gave it to the heirs of the body of Ann Cornish, as well females as males; therefore they could not take otherwise than as purchasers. It would be a void devise, if the words were to be construed as words of limitation; for the testator breaks the gavelkind descent, by giving it to females as well as males. He likewise added: "and to their heirs and assigns forever, to be divided equally, share and share alike." Nay, he went further: "as tenants in common, and not as joint tenants." But this could not be, if they were to take in a course of gavelkind descent, for in such case they must take as coparceners. Upon the whole, as no man could doubt of the testator's intention, and as this was the only method of effectuating it, and as there was no rule of law that prevented heirs taking as purchasers, where the intention of the testator required it, so he was of opinion that the words, heirs of the body, were words of purchase. Judgment was given accordingly.[1]

45. A person devised to his niece M. O., and the issue of her body, lawfully to be begotten, as tenants in common if more than one; but in default of such issue, or being such, if they should all die under the age of twenty-one, and without leaving lawful issue of any of their bodies, then over. (*b*)

(*a*) Doe *v.* Laming, 2 Burr. 1100. 1 Black. R. 265.
(*b*) Doe *v.* Burnsall, 6 Term R. 30. Doe *v.* Elvey, 4 East, 313.

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[1] See Sisson *v.* Seabury, 1 Sumner, 235, where this case and others of the same class are commented on by Mr. Justice Story. In that case, lands were devised "to A and to his male children, lawfully begotten of his body, and their heirs forever, to be equally divided amongst them and their heirs forever;" A at that time having no children; and it was held a life-estate in A, with a contingent remainder to his children. And see Doe *v.* Provost, 4 Johns. 61; Dingley *v.* Dingley, 5 Mass. 535; Adams *v.* Cruft, 14 Pick. 22; Doe *v.* Harvey, 4 B. & C. 610; Greenwood *v.* Rothwell, 5 M. & Gr. 628.

The Court of K. B. held, that the niece only took an estate for life.

46. A testator devised to his daughter Mary, and to all and every the child and children, whether male or female, of her body lawfully issuing, and unto his, her, and their heirs or assigns forever, as tenants in common. It was held by Sir John Leach, V. C., that the daughter took an estate for life, with remainder to her children as tenants in common in fee. (*a*)

47. An estate may be devised to a person for *a term of years*, as well as for any freehold interest; and it has been stated to have been formerly held, that a devise to a person and the heirs of his body for 500 years would determine by the death of the devisee without issue; but that this doctrine had been altered, *and it was settled that such a term would continue for 500 years, and vest in the executors of the devisee. (*b*) [1] *274

48. It has been also stated, that a devise to executors for payment of debts creates an estate for years; and also a devise till such time as a particular sum shall be raised out of the rents and profits of the lands devised. (*c*)

49. With respect to *uncertain interests*, if a man devises lands to his wife, till his son comes of age, to provide his children with necessaries, this interest does not determine by the death of the wife, but goes to her executors. (*d*)

50. If the devise had been that his lands should descend to his son, but that his wife should have the full profits till his son came of age, for his maintenance; here nothing being given to the wife but a mere confidence, her interest would determine with her death. (*e*)

51. In a case which has been already stated, it was resolved that the wife's estates determined by the death of the son. (*f*)

(*a*) Jeffery *v.* Honywood, 4 Madd. 398.
(*b*) Tit. 8, c. 2. [Doe *v.* Lakeman, 2 B. & Adol. 30.]
(*c*) Tit. 8, c. 1.
(*d*) Smith *v.* Havens, Cro. Eliz. 252.
(*e*) Anon. 2 Leon. 221.
(*f*) Mansfield *v.* Dugard, tit. 16, c. 1, § 80.

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[1] In *Massachusetts* and *Vermont*, terms of which fifty years or more remain unexpired, have many attributes of freeholds; and in *Ohio*, permanent leaseholds, renewable forever, are deemed freehold estates. See *ante*, tit. 8, ch. 1, § 9, note.

CHAP. XIV.

CONSTRUCTION—RULE IN SHELLEY'S CASE.

SECT. 1. *Applied in Devises of Legal Estates.*
7. *Though the Limitation be only Mediate.*
10. *Though the Estate for Life arise by Implication.*
12. *Where the word* Heir *is used.*
17. *Though there are superadded Words of Limitation.*
21. *Or Words of Modification of the Estate.*
26. *Applied in Devises of Trust Estates.*
31. (*And in Estates pur autre vie.*)
37. *And in Wills of Terms for Years.*
39. *The Rule not applied to the words* Sons *or* Children.
SECT. 44. *Or to the word* Heirs, *with Words of Explanation.*
48. *Or to the word* Heir, *with Words of Limitation.*
51. *Or to* Heirs, *with words limiting a particular kind of Estate.*
52. *Or to the Heir for Life.*
54. *Or to* Issue, *with Words of Limitation.*
58. *Unless the general intent require a different Construction.*
63. *Or where an Executory Trust is created.*
72. *Or where the Estates are of different Natures.*
76. *Case of Perrin* v. *Blake.*
78. *General Observations on the Rule.*

SECTION 1. THE *rule established in Shelley's case*, of the origin of which an account has been already given, having been established for purposes of general utility, has been *adopted in the construction of devises of legal estates*, as well as in that of deeds.[1] But it being a principle of law that the intention of the

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[1] This rule has been totally abolished in many of the United States. In *New Hampshire, New Jersey*, and *Missouri*, it is abolished only in case of lands devised. N. Hamp. Rev. St. 1842, ch. 156, § 5; N. Jer. Rev. St. 1846, tit. 10, ch. 2, § 10; Misso. Rev. St. 1845, ch. 185, § 46. In several other States it has been distinctly recognized as a subsisting rule of property. See *ante*, tit. 32, ch. 23, § 3, note. [This rule is in favor in *Georgia*. Dudley *v.* Mallery, 4 Geo. 52. For application of the rule in *Pennsylvania*, see George *v.* Morgan, 16 Penn. State R. (4 Harris,) 95.]

For further discussion of the rule, see Hayes on Limitations in Devises, p. 52–56, 87–115; 2 Jarman on Wills, ch. 37, p. 241–270, by Perkins.

testator is to be the chief guide in the expounding of devises, it has been often doubted how far the application of this rule should be extended, in contradiction to the particular intention of the testator. It has, however, been uniformly held, that in all cases of devises of legal estates wherever lands are given to a person for life, * or for any greater estate, with an *immediate*[1] remainder to the heirs, or heirs of the body, of such devisee, the word "*heirs*" or the words "*heirs of the body*," shall operate as words of limitation, and give the devisee an estate in fee simple, or in tail. (*a*) *276

2. A person devised lands to his son John, to hold to the said John for life, and after his decease, then to the use and behoof of the heirs male of his body; and for default of such issue, to his son Robert and the heirs male of his body. (*b*)

It was resolved that the first words created an estate tail, as well in a will, as in any other conveyance. The estates could not stand together, but the estate for life was swallowed up in the estate tail.

3. Although it should appear from other circumstances, besides an express devise for life, that the testator did not intend to give the first devisee a greater estate, such as a power to settle a jointure, with the concurrence of trustees; or an interposed estate to trustees to preserve contingent remainders; or a clause that the devisor's estates should be without impeachment of waste; yet the Courts have applied the rule, and given the devisee an estate of inheritance.[2]

4. A person devised lands to trustees and their heirs, to the intent and purpose that they should permit and suffer A to re-

(*a*) Tit. 32, c. 23. (Bishop *v.* Selleck, 1 Day, 301. In re James, 1 Dall. 48. Horne *v.* Lyeth, 4 H. & J. 431.)

(*b*) Rundale *v.* Eeley, Cart. 170. Measure *v.* Gee, 5 Barn. & Ald. 910.

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[1] If there is a *second* estate for life intervening between the first estate for life and the remainder limited to the heirs of the first taken, it has been doubted whether the rule in Shelley's case would apply. Richardson *v.* Wheatland, 7 Met. 169, 172.

[2] Where, by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life estate; unless there are other words, which plainly show the testator to have used the former words as words of purchase, contrary to their ordinary sense; or, in the other provisions of the will, there be a clearly expressed inconsistent intention, which can only be fulfilled by sacrificing the particular provision, and regarding the expressions as words of purchase. Jack *v.* Featherston, 9 Bligh, 237; 3 Cl. & Fin. 67.

ceive and take the rents and profits for and during the term of his natural life; and after his decease should stand seised of the same lands to the use of the heirs of the body of A; with the proviso that the trustees and A might make a jointure for his wife. (*a*)

It was determined that A took an estate tail.

5. Lands were devised to B for life, without impeachment of waste, remainder to trustees and their heirs during the life of B to support contingent remainders, remainder to the heirs of the body of B, remainder over. (*b*)

Sir J. Jekyll was of opinion that an estate for life only passed to B, with remainder to the heirs of his body, by purchase. But upon an appeal to Lord King, he said the remainder to the heirs of the body of B was within the general rule, and must operate as words of limitation, and consequently create a vested estate tail in B; and that the breaking into this rule would occasion the utmost uncertainty.

6. A person devised in these words, — "I give to my
277* loving *brother G. S. and the heirs of his body, the males having preference, and succeeding according to their births; and to preserve contingent remainders from being barred during the life of the said G. S., I give the said estates and farms to my friend Doctor R.; and on failure of issue of the said G. S., I give the said estates and farms to my niece." The cause came on to be heard before Lord Hardwicke, who directed a case to be made for the opinion of the Judges of the K. B. Afterwards upon his resigning the great seal, Lords Commissioners Wiles, Smythe, and Wilmot succeeding to it, application was made to them to hear the cause, which they consented to do, considering themselves as Judges at law, though sitting in a court of equity. (*c*)

Lord Commissioner Wilmot said the reason of the rule in Shelley's case, that where one takes an estate of freehold, and after an estate is limited to the heirs male of his body, the heirs male must take by descent, and not by purchase, was, to secure to the lord his fruits on descent, and had long since ceased. But it had been better if that rule had never been broke in upon.

(*a*) Broughton *v.* Langley, 2 Ld. Raym. 873. Tit. 12, c. 1, S. C. 12 East, 461.
(*b*) Papillon *v.* Voice, 2 P. Wms. 471.
(*c*) Sayer *v.* Masterman, Amb. 344.

He was not for breaking in upon it further. He could not find any case where the words, heirs of the body, in the plural number, and no words superadded, had been considered as words of purchase, and referred to Lord King's opinion in Papillon *v.* Voice, that the limitation to trustees did not control the estate tail.[1]

The Court declared that G. S. was entitled to an estate tail.

7. *Where the limitation* to the heirs, or heirs of the body of the devisee for life, *is only mediate*, by the interposition of some other estate, the devisee will, notwithstanding, take an estate in fee simple, or in tail, in remainder; to take effect in possession, upon the determination of the interposed estate; and the estate for life is not merged in the remainder. (*a*)[2]

8. R. Bromley being entitled to a reversion in fee in certain lands, expectant upon the death of Elizabeth Foster, devised the same to Robert Colson for life, remainder to trustees during his life, to preserve contingent remainders, remainder to the heirs of the body of the said Robert Colson, remainder over. (*b*)

The question was, what estate Robert Colson took under this devise; and the case having been sent by the Chancellor (Lord Hardwicke) to the Court of K. B., the Judges of that Court sent the following certificate:—"We have heard counsel * in the question referred by your Lordship to us; *278 and as it appears by the state of the case, there is, after the determination of the estate for life of Robert Colson, a devise to J. B. and R. R. and their heirs, for and during the life of Robert Colson, we are of opinion that by reason of that remainder interposing between the devise to Robert for life, and the subsequent limitation to the heirs of his body, the said Robert took an estate for life, not merged by the devise to the heirs of his body;

(*a*) (*Sed vide* Richardson *v.* Wheatland, 7 Met. 172.)
(*b*) Colson *v.* Colson, 2 Atk. 247. 2 Stra. 1125.

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[1] Other cases are, Reece *v.* Steel, 2 Sim. 233; Irwin *v.* Cuff, 1 Hayes, 30; Burnet *v.* Denniston, 5 Johns. Ch. 35; M'Clintick *v.* Manns 4 Munf. 328; Ward *v.* Bevil, 1 Y. & J. 512; Langstone *v.* Pole, Tam. 119; Roosevelt *v.* Thurman, 1 Johns. Ch. 219; Broadders *v.* Turner, 5 Rand. 308; Williams *v.* Foster, 3 Hill, S. C. Rep. 193.

[2] Roy *v.* Garnett, 2 Wash. 34; Fearne, Rem. 25. But see Richardson *v.* Wheatland, 7 Met. 172; *Supra*, § 1, note.

but by that devise an estate tail in remainder vested in the said Robert."

Against this certificate the counsel cited 2 Roll. Ab. 418, pl. 4 & 5, to prove the remainder to the heirs of the body contingent. But after looking into the book, Lord Hardwicke paid no regard to it; and decreed according to the opinion of the Judges. (*a*)

9. In the case of Hodgson *v.* Ambrose, which has been already stated, there was a devise to Elizabeth Belchier and Catherine Jolland, in the same words as in the case of Colson *v.* Colson; a case was made for the opinion of the Court of K. B. upon the following question:—" Whether Catherine Belchier, the daughter of Elizabeth Belchier, took any, and what estate under the will of Susan Jolland; and, secondly, what estate Catherine Jolland took under the said will." (*b*)

The Judges of the Court of King's Bench gave their opinion in the following words: " As to the question whether Elizabeth would have taken an estate tail, whatever our opinions might be if the case were new, we think, as the case of Colson *v.* Colson is literally the same, the precise question ought not to be again litigated; and by that authority we are bound to say, in the words of the certificate in that case, that as it appears by the state of the case that there is, after the determination of the estate for life to Elizabeth Belchier, a devise to W. A. and J. P. and their heirs, for and during the life of Elizabeth Belchier, we are of opinion that Elizabeth Belchier, if she had survived the testatrix, would have taken an estate for life in the premises devised to her, not merged by the devise to the heirs of her body; but by that devise an estate tail in remainder would have vested in the said Elizabeth; and that Catherine Jolland took an estate for life in all the devised premises, not merged by the devise to the heirs of her body; but by that devise an estate tail in remainder, vested in the said Catherine Jolland."

279 * * The Court having decreed in conformity to this certificate, an appeal was brought in the House of Lords, where the following question was put to the Judges: " What estate Catherine Hodgson took under the will." And the Lord Ch. Baron of the Exchequer having delivered the unanimous

(*a*) MSS. Rep. (*b*) *Ante*, c. 8, § 29.

opinion of the Judges present, "That Catherine Hodgson took an estate for life in all the premises, not merged by the devise to the heirs of her body; and that by that devise an estate tail in remainder vested in the said Catherine;" it was ordered and decreed, that the appeal should be dismissed, and the decree affirmed. (*a*)

10. Though no *estate for life* be expressly devised, but only *arises by a necessary implication* from the words of the will, yet the rule will be applied. (*b*)

11. I. Foorde made his will, having then two sons, Rawlinson and William, and a brother Nicholas, who had then also two sons, James and Nicholas, and gave his estate real to his eldest son Rawlinson at his age of twenty-three, to enjoy the whole during his life. "And the whole estate, of which he is only tenant for life, shall after his decease go to his eldest son that shall be then living; and if he dies without any son or sons to enjoy it during their lives, (of which none are or shall be tenants but while they live to enjoy it,) that then it shall come to his brother William Foorde during his life, and to any of his heirs male during their lives, and no longer; and if they die without issue male, then to the heirs male of my brother Nicholas Foorde's sons, and to any of their heirs male during their lives (of which none of them are tenants any longer, nor shall it be in any of their powers to sell, dispose, or make away any part or the whole of it); and in case they all die without heirs male, then it is to go to the next of kin of me." (*c*)

At the same time, and with the same solemnities, the testator published a schedule, referred to in the said will, and which the special verdict found to be part of his will, containing a very particular account of all his real and personal estate; the title to which schedule was in these words: "An account how I dispose of my estate to my son Rawlinson Foorde, as followeth:—He paying his mother out of my real estate the sum of £15 per annum during her life, and £24 per annum out of my mortgages, and then all to revert to my son Rawley Foorde, during his life; and after his death to his sons; and for want of sons, to his *brother William Foorde, during his life, and after- *280

(*a*) [Doe *v.* Colyear, 11 East, 548. Measure *v.* Gee, 5 Bar. & Ald. 910.]
(*b*) (Bowers *v.* Porter, 4 Pick. 207. Carr *v.* Porter, 1 M'Cord, Ch. R. 60.)
(*c*) Hayes *v.* Foorde, 2 Black. R. 698. [Reece *v.* Steel, 2 Sim. 233.]

wards to William Foorde's eldest son; and for want of his having sons, to my brother Nicholas Foorde's sons; and for want of any sons, to my sons' daughters, and so to the next of kin."

Rawlinson and William, the two sons of the testator, died without issue male; James, the eldest nephew, died before William the son; and upon William's death, the youngest nephew entered, and suffered a recovery. The question was, whether Nicholas the nephew took an estate for life, or in tail, under the will and schedule.

The Court of K. B. in Ireland was of opinion that he took only an estate for life.

Upon a writ of error to the Court of K. B. in England, Lord Mansfield delivered the opinion of the Court, that the only doubt was, whether by the words of the will, Nicholas, the nephew of the testator, took any estate by implication. That this doubt was removed by the schedule, which expressly gave an estate to the sons of his brother Nicholas Foorde; that therefore Nicholas the nephew took an estate for life by implication, thus explained, which being conjoined to the estate expressly given to his heirs male, would by the known rules of law, give him an estate in tail male. Judgment was given accordingly.

12. Although the limitation be to "*the heir*," in the singular number, yet the rule will be applied, and the devisee will be construed to take an estate tail. (*a*)

13. Thus, Lord Hale says, it was adjudged in 43 Eliz. that a devise to A for life, remainder to the next heir male, and for default of such heir male, then to remain over, was an estate tail. (*b*)

14. A person devised lands to his youngest son forever, and after his death, *to the heir male of his body forever;* and for default of such heir male, to E. his eldest son, forever. It was resolved, that the youngest son took an estate tail. (*c*)

15. In a case cited by Mr. Robinson, in his Custom of Gavelkind, there was a devise to Serjeant Miller and his wife for their lives, remainder *to the next heir male* of their two bodies. It was held that this was a devise in tail; for a devise to the heir

(*a*) (*Supra*, ch. 10, § 37.) (*b*) Burley's case, 1 Vent. 230.
(*c*) Welkins *v.* Whiting, 1 Roll. Ab. 836. Bulst. 219. 2 Vern. 324.

male was a devise in tail, unless there were words of limitation superadded, so as to bring it within the reason of Archer's case. *But the words "*first*, *next*, or *eldest*," or any like *281 words superadded, made no difference. (*a*)

16. Sir T. Trollope devised the manor of A. to his first son William for life, remainder to the heirs male of his body, remainder to his second son Thomas for life, and after his death to *the first heir male* of his body. (*b*)

The Court held that the words "*heir male*" were to be understood collectively, and that Thomas took an estate tail; it appearing that such was the testator's intention by the other devises. That this stood distinguished from Archer's case, no limitation being superadded to the words "*first heir male;*" and the word *first* should be understood first in order of succession from time to time. (*c*)

17. A devise to the heirs, or heirs of the body, of a prior devisee, with *superadded words of limitation*, will be construed to be within the rule in Shelley's case, so as to create an estate in fee or in tail. (*d*)[1]

18. A person devised to Nicholas Lisle for his life, and after the decease of the said Nicholas, he devised the same unto the heirs male of the body of the said Nicholas, lawfully to be begotten, and his heirs forever; but if the said Nicholas should happen to die without such heir male, then he devised over. (*e*)

(*a*) Miller *v.* Seagrave, Rob. Gav. 96. *Infra*, s. 49.
(*b*) Dubber *v.* Trollope, Amb. 453. Cases temp. Hardwicke, 160.
(*c*) [O'Keefe *v.* Jones, 13 Ves. 413.] *Infra*, s. 49.
(*d*) (Roe *v.* Bedford, 4 M. & S. 362. Doe *v.* Harvey, 4 B. & C. 610. 7 D. & R. 78. Doe *v.* Featherstone, 1 B. & Ad. 944. Osborne *v.* Shrieve, 3 Mason, 391.)
(*e*) Goodright *v.* Pullyn, 2 Ld. Raym. 1437. 2 Stra. 729.

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[1] If the devise over is expressly, or by construction of law, contingent, namely, to such as may be heirs of the first taken at the time of his decease, the rule in Shelley's case would not apply. Bowers *v.* Porter, 4 Pick. 205. [Chilton *v.* Henderson, 9 Gill, 432.]

To change the word "*heirs*" into a word of purchase, the heirs must be disabled to take as heirs, by reason of a distributive direction, incompatible with the ordinary course of descent, or the limitation must be directed to the *then* presumptive heirs of the person to whom the estate for life is limited. 4 Kent, Comm. 230; Horne *v.* Lyeth, 4 H. & J. 431; and see Lyles *v.* Digge, 6 H. & J. 364; Findlay *v.* Riddle, 3 Binn. 139; Davis *v.* Hayden, 9 Mass. 514; [Doe *v.* Jackman, 5 Ind. (Porter,) 283.]

The Judges were all of opinion that this was an estate tail in Nicholas. They held that the subsequent words relied on, as *his*, and *if he died without such heir male*, were not sufficient to restrain and alter the operation of the words, *heir males*, and so qualify them as to make them a description of the person; and that the operation of plain and clear words, and a settled rule of law, should not be defeated or broken into by uncertain or doubtful words, which they took the last at least to be. (*a*)

19. The following case was sent by the Lord Keeper to the Court of C. B. for its opinion. (*b*)

G. Legate devised his lands, in default of issue of his own body, to his nephew William Legate, for and during the term of his natural life, and after his decease, to the heirs male of the body of his said nephew lawfully to be begotten, and the heirs male of the body of every such heir male, severally and successively, as they should be in priority of birth; and for want
282* of *such issue, to his brother, &c. The question was, whether William Legate, the nephew, had an estate tail vested in him, or an estate for life only.

Three of the Judges were of opinion that William Legate had an estate tail vested in him, and Mr. Justice Tracey certified that he had only an estate for life.

Mr. Peere Williams says, the Court appearing not to be satisfied with the certificate of the three Judges, directed an ejectment to be brought in B. R. in order to have the matter settled: but it was said the parties agreed, and so the question was not determined. Yet in 2 Vesey, 657, Lord Hardwicke says, Lord Cowper held himself bound to agree with the three Judges, and so decreed.

20. Thomas Wardell devised thus,—"I give and bequeath unto my daughter Lucretia all my plantations, together with the negroes, &c., during the natural life of my said daughter. *Item*, I bequeath to the heirs of the body of my said daughter Lucretia, begotten or to be begotten, and to his or her heirs forever, after my said daughter's decease, all my before-mentioned plantations, &c. But for want of such heirs of the body of my said daughter, I also give and bequeath the aforesaid premises, after

(*a*) [Wright *v.* Pearson, 1 Eden, 119.] (*b*) Legate *v.* Sewell, 1 P. Wms. 87.

the decease of my said daughter, to my own next heirs, and their heirs forever." (*a*)

This case came on before the Privy Council upon an appeal from Barbadoes, and the following reasons were used in the printed case,

"It is a general rule of law, that when an estate is limited to one for life, a limitation afterwards to the heirs of the body of that same person creates an estate tail. And though this be in the case of a will, there is no reason to depart from that rule; for if Lucretia were construed to have an estate for life only, then the remainder to the heirs of her body would be words of purchase; and then, though she had several sons, yet the eldest only would have been heir, and the younger sons would never have taken under that limitation, though it was clearly the testator's intention that all her sons should take, by using the word *heirs*, in the plural number. And the subsequent clause,—'for want of such heirs of the body of my said daughter, to my own next heirs, and their heirs forever,' is a further explanation of his meaning, that his daughter should take an estate tail, with a *remainder to his own right heirs. Signed, N. *283 Fazakerley. D. Ryder."

This case was heard before the Privy Council in 1730, when it was ruled that Lucretia took an estate tail. The Chief Justices, Raymond and Eyre, assisted at the decision. And Lord Kenyon has said, that though the above were only the reasons of the counsel in that case, they contained as much good sense and sound law as if they had the authority of all the Judges of England. (*b*)

21. [The rule under consideration is equally applicable, notwithstanding *superadded words of modification, inconsistent with an estate tail* in the first taker.

22. Thus where the devise was to A, for life, and after his decease to the heirs of his body to take as tenants in common: † or to the heirs of his body in such shares and proportions, man-

(*a*) Morris *v.* Ward, cited 8 Term R. 518. [Nash *v.* Coates, 3 Bar. & Adol. 839.]
(*b*) Measure *v.* Gee, 5 B. & Ald. 910. Kinch *v.* Ward, 2 Sim. & Stu. 411.]

[† Bennett *v.* Earl Tankerville, 19 Ves. 170; Doe *v.* Featherstone, 1 B. & Adol. 944.]

ner and form as A should appoint; † and in default of appointment to the heirs of his body, share and share alike. ‡

23. So also where the devise was of real estates subject to debts and legacies, to T. C. for life, and after the determination of that estate in his lifetime to A and B and their heirs during his life, to preserve contingent remainders, and after the decease of T. C., to and among all and every the heirs of the body of T. C. as well male as female, to take as tenants in common; it was decided T. C. took an estate tail. (*a*)

24. The above rule of construction has not been adopted without considerable conflict of opinion, involving some collision of authority; § but it is conceived that the rule as above stated is now settled.]

25. There are, however, some cases in which superadded words of limitation may control the words "*heirs*," and "*heirs of the body*," so as to render them words of purchase; of which an account will be given hereafter.

284 * * 26. In consequence of the rule that equity follows the law, it has been long settled that in *devises of mere trust estates*, where no conveyance is directed to be made, the construction is the same in Chancery, as it would be in a court of common law, upon a devise of a legal estate; so that the rule in Shelley's case is there applied to the construction of devises, as well as at law. (*b*)

27. One devised lands to four persons and their heirs, for payment of debts, and afterwards to the use of them and their heirs. After which, by a codicil, he devised that his will should stand, saving that when his debts were paid, A, who was one of the four devisees in the will, should have his share of the lands to himself for life, with a power to make leases for ninety-nine

(*a*) Doe *v.* Harvey, 4 B. & Cress. 610. (*b*) Sweetapple *v.* Bindon, tit. 5, c. 2, s. 14.

[† Doe *v.* Goldsmith, 7 Taunt. 209.]

[‡ Doe *v.* Jesson, 5 M. & Sel. 95; 2 Bli. 1; *Infra*, s. 62.]

[§ Wilson *v.* Vansittart, Amb. 562; Doe d. Browne *v.* Holme, 3 Wilson, 237, 241; Doe *v.* Laming, 2 Burr. 1100; Doe *v.* Ironmonger, 3 East, 533; Doe *v.* Goff, 11 East, 668; Gretton *v.* Haward, 6 Taunt. 94; Crump *v.* Norwood, 7 Taunt. 362; 2 Marsh. 161; Right *v.* Creber, 5 B. & Cress. 866, and other cases which it is not considered necessary to cite in this place.]

years determinable on three lives, remainder to the heirs male of his body, remainder over. (*a*)

Lord Cowper was of opinion, that A ought to be tenant for life only, with remainder to his first and other sons in tail male, But the case coming on before Lord Harcourt, on a rehearing, he said—" This being the case of a will, differs from the several cases that have been cited of marriage articles, in the nature of which the issue are particularly considered, and looked upon as purchasers; and for which reason, the Court has restrained the general expressions made use of by the parties; for it cannot reasonably be supposed that a valuable consideration would be given for the settlement of an estate, which, as soon as settled, the husband might destroy. But no case has been cited where, upon the words of a will, or the parties claim voluntarily, the like decree has been made. In all such cases, the testator's intent must be presumed to be consistent with the rules of law, and at law these words would certainly create an entail. Neither can it be inferred, with any certainty, from the power of leasing given by the testator, that no estate tail was intended; in regard such power of leasing is more beneficial than that given to tenant in tail by statute. And as the debts are admitted by the pleadings to be all paid, the same construction is now to be made, as if there had been originally no trust. So decree A's share or fourth part to be conveyed to him and the heirs male of his body, remainder over," &c.

28. The doctrine laid down in the preceding case, was contradicted by Lord Hardwicke in the following one. A person devised an estate to trustees, their heirs, and assigns, in trust that *they and their heirs should in the first place, *285 by the rents and profits, or by sale or mortgage of the premises, raise so much as should be necessary for the payment of his debts; and after payment thereof, gave the same unto his trustees for 500 years, without impeachment of waste, upon trust as after mentioned; and then went on in these words,—" And from and after the determination of the said estate for years, then I give and devise all my said lands, &c. unto my said trustees, their heirs and assigns, my mind being that my said trustees shall be and stand seised of the said premises in trust to the

(*a*) Bale *v.* Coleman, 1 P. Wms. 142. [Philips *v.* Brydges, 3 Ves. 120.]

several uses, behoofs, intents, and purposes after declared; viz.: as for one moiety of the same premises, I give and devise the same to the use and behoof of my nephew Thomas Bagshaw, for the term of his natural life, without impeachment of waste; and from and after the determination of that estate, to my said trustees and their heirs, for and during the life of the said Thomas Bagshaw, to preserve and support the contingent uses and remainders hereinafter limited, but to permit the said Thomas Bagshaw to receive the rents and profits during his natural life; and after his decease, then to the use and behoof the heirs of the body of the said Thomas;" and for want of such issue, then to Benjamin Bagshaw in the same manner. (*a*)

Lord Hardwicke held, that Benjamin Bagshaw took an estate for life only; for if a conveyance had been prayed, there must have been a limitation to trustees to preserve contingent remainders, and then the next limitation must have been to the first and other sons of Benjamin Bagshaw; for there were no contingent uses or remainders, unless the limitations to the heirs of the body of B. Bagshaw were allowed to be such.

The preceding case is not now held to be any authority, as it has been contradicted by Lord Keeper Henley, in a case which will be stated hereafter; and also by a determination of Lord Thurlow. (*b*)

29. Sir Edward Turner devised all his real estate to C. B., in trust to pay the rents to Sarah Garth for her life, and after her death, to pay the same to Edward Turner Garth, her son, for life, and afterwards to pay the same to the heirs of his body. (*c*)

Lord Hardwicke said, that upon the true construction of this will, he was obliged by the rules of law and equity to direct the conveyance to be to the son in tail: because in limitations
286 * of a * trust, either of real or personal estate, to be determined in the Court of Chancery, the construction ought to be made according to the construction of limitations of a legal estate; with this distinction, unless the intent of the testator, or author of the trust, plainly appears to the contrary. But if the intent does not plainly appear to contradict and overrule the legal

(*a*) Bagshaw *v.* Spencer, Collect. Jur. vol. 1, 378.
(*b*) Fearne, Cont. Rem. 120, ed. 8.
(*c*) Garth *v.* Baldwin, 2 Vez. 646. Fearne, C. R. 125, Ib.

construction of the limitation, it was never laid down, nor was it by him in the case of Bagshaw *v.* Spencer, that the legal construction should be overruled by any thing but the plain intent: —that he was not in a court of equity to overrule the legal construction of the limitation, unless the intent of the testator, or author of the trust, appeared by declaration plain, that is, not saying it in so many words, but plain expression, or necessary implication of his intent; which was the same thing.

30. Henry Rayney, having five grandchildren, devised all his freehold estates to trustees and their heirs, in trust to raise a sum of money for his grandchildren; and subject thereto, to the use of his nephew, T. Rayney, and his assigns for his life, remainder to trustees to preserve contingent remainders, remainder to the use of the heirs male of the said T. Rayney begotten, and their heirs; provided, that in case the said T. Rayney should die without leaving any issue male of his body living at his death, then and in such case he subjected the premises to the payment of £100 a-piece to his two nieces; and for default of such issue male of his said nephew, T. Rayney, then, as to all the premises, to his five grandchildren, or such as should be living at the time of the failure of issue male of the said T. Rayney, their heirs and assigns; provided that the said T. Rayney should be put out apprentice to a surgeon, or sent to Cambridge; and in case he should refuse to be an apprentice, or to go to Cambridge, then his will was that the estate so before limited to the said T. Rayney for his life, should cease and determine, and be void, as if he had been dead; and that the said premises so limited to the said Thomas for his life, and his issue male as aforesaid, should from thenceforth revert over and go to such of his grandchildren as should be living, and to their heirs. (*a*)

T. Rayney died without issue, having suffered a recovery of the premises; and the question was, whether he took an estate tail, or an estate for life.

Lord Keeper Henley said, first, that the estate was a fee in *the trustees, and not executed by the Statute of Uses *287 in any of the subsequent limitations. But he thought that was not very material in the principal case, as by the will the trusts were fully limited and declared. For he thought it very

(*a*) Wright *v.* Pearson, Amb. 358. Fearne, Cont. Rem. 126, ed. 8. 1 Eden. 119.

dangerous that a different construction should be put upon words of limitation, in cases of trusts and legal estates, except where the limitations were imperfect, and something seemed left to be done by the trustees in the first place; and consequently, secondarily by the Court of Chancery.

The second question was, whether the heirs male of Thomas Rayney took a fee as purchasers, or in tail, under the limitation to the father. He thought that T. Rayney took an estate tail, from the apparent intent of the testator, who plainly intended that the heirs male, &c., should not take an estate in fee, which they must, if they took as purchasers. He was considering, he said, whether he could not make this construction, namely, to Thomas for life, then to his heirs male in tail, then to the grandchildren. And if the limitation had been, for default of such heirs of the body, he might have considered it as heirs of the body of the heirs male, &c., mentioned before. But the limitation there was, for default of such issue male, &c. He thought the words, "*and their heirs*," in the will, were redundant and surplusage; and that Thomas Rayney took an estate tail; and consequently, that the recovery suffered by him was good. And though it was a rule, never to reject words in a will, if they could stand, yet he must do it in this case, to support the testator's intent.

He said, that in the case of Bagshaw *v.* Spencer, which was a case of a trust, as the principal one was, Lord Hardwicke did upon that ground, and the limitation of the other moiety of the estate to the Spencers, and other circumstances in the case, which showed the intent of the testator plain and clear, construe it to be only an estate for life in Bagshaw, contrary to the former determinations. He did it on the plain intent of the testator, and in so doing, assumed no more power than every court of law had.

31. John Holman gave all his estate to trustees and their heirs, to the uses, trusts, and purposes therein mentioned; first, to the intent that his sisters should receive an annuity for their lives, and subject thereto, in trust for the plaintiff for life,
288* remainder *to trustees to preserve contingent remainders, remainder to the heirs of the body of the plaintiff, remainder to his own right heirs. He also gave the residue of his per-

sonal estate to trustees, in trust to buy lands in fee, which he directed should remain, continue, and be, to, for, and upon such and the like estate and estates, trusts, intents and purposes, as were by him before devised, limited, or declared of and concerning his lands and premises thereinbefore devised, or as near thereto as might be, and the deaths of persons would admit. (*a*)

Upon a bill to have the residue laid out according to the will, the question was, whether the plaintiff was entitled to an estate for life, or in tail, in the lands to be purchased.

Lord Keeper Henley said, nothing was left to the trustees to be done but to buy the land; the testator had declared the uses of the land when purchased: he did not believe the testator intended the trustees should make a conveyance; there was no necessity for it. It was said, if the words in the former limitation had been again repeated, it would have been the very case of Papillon *v.* Voice; (*b*) but he thought otherwise. There was a direction to the trustees in that case to convey, but there was no direction here. The true guide was this, where the assistance of trustees, which was ultimately the assistance of the Court of Chancery, was prayed in aid, to complete a limitation, in that case, the limitation in the will not being complete, it was a sufficient declaration of the testator's intention that the Court should model the limitations; but where the trusts and limitations were expressly declared, the Court had no authority to interfere, and make them different from what they would be at law.

Decreed, that the plaintiff was entitled to an estate tail.

32. Sir William Morgan devised an estate to trustees, to raise money in aid of his personal estate, for the payment of his debts; and after payment thereof, then to stand seised to the use of his son William, for and during the term of his natural life, without impeachment of waste; and from and after his decease, to the use and behoof of the heirs male of the body of his said son William, lawfully to be begotten, severally, respectively, and in remainder, one after another, as they and every of them should be in priority of birth and seniority of age; and for default of such issue, to any after-born son he might have; with a

(*a*) Austen *v.* Taylor, Amb. 376. 1 Eden, 361. Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 559, 572, and see per Lord Eldon, 17 Ves. p. 76. (*b*) *Infra*, § 65.

289 * power, * while in possession, of leasing, making a jointure and raising portions for younger children. (*a*)

The question was, whether William the son took an estate in tail or for life only.

Lord Thurlow said, he could not distinguish this case from that of Wright *v.* Pearson, with which the case of Bagshaw *v.* Spencer could not stand. It had been contended, that however it might be at law, it should be construed otherwise in equity, for that the whole fee was given to the trustees, as it might be necessary for the payment of the debts; but after payment of the debts, the testator did not mean to leave any thing executory; no, the trustees were to stand seised to the subsequent uses. If this was not a legal estate, it was only not so because the first use might absorb the whole estate; then the only question was, whether, under the cases decided, he must consider this point as being different in the case of legal and equitable estates. In Garth *v.* Baldwin, the construction restored the law, that trusts were to be considered in the same manner as legal estates; if that were so, there could not be a more proper case to apply the rule than this, as there could be nothing so near a legal estate as the present: he thought therefore the same rule of construction must apply in equity, as at law; and decreed, that William took an estate tail. (*b*)

33. Where the Court of Chancery is called upon to direct a conveyance to be made under a will, the construction has been different; of which an account will be given hereafter.

290 * * 34. [The rule in Shelley's case has been also applied to the construction of limitations in wills and deeds of *estates per autre vie.*

35. In Low *v.* Burron, a person, seised of an estate for three lives, devised it to his daughter Mary for life, remainder to her issue male, remainder over; the questions in the cause, and the decision, were grounded on the assumption that Mary took a *quasi* estate tail. (*c*)

36. In Forster *v.* Forster, leaseholds for lives were settled upon trust for John Forster for life, and (after an intermediate charge

(*a*) Jones *v.* Morgan, 1 Bro. C. C. 206.
(*b*) [Poole *v.* Poole, 3 Bos. & P. 620. *Infra*, § 47.]
(*c*) 3 P. Wms. 262.

for portions,) in trust for the heirs male of John, remainder in trust for the heirs male of Charles, the father and settlor, remainder to his right heirs. It was decided, that the limitations to the heirs of the body, and to the right heirs of Charles, were not words of purchase, giving contingent remainders to the heirs male of Charles, but were words of limitation, and that upon the death of Charles, the *quasi* entail was executed in possession in John, and that he had barred it by a subsequent settlement.] (*a*)

37. The rule in Shelley's case has also been applied in the construction of wills of *terms for years.* Therefore if a term be given to A for life, and afterwards to the heirs of his body, these words are generally construed to be words of limitation, and the whole vests in the first taker. (*b*)

38. But if there appear any circumstance or clause in the will, to show the intention that these words should be words of purchase, and not of limitation, then it seems the ancestor will take for life only, and his heir will take by purchase. (*c*)

39. The rule in Shelley's case *does not apply* to the words "*sons*" or "*children.*" And therefore a devise to A for life, with remainder to his first and other sons, or to his sons or children, gives to A only an estate for life, and his sons or children will take by purchase. (*d*)

40. Thus, Lord Hale has cited a case, stated in 1 Roll. Ab. 837, pl. 13, where a person devised to his eldest son for life, *et non alitèr;* and after his decease to the sons of his body: it was held to be an estate for life only in the son. And the usual mode of creating a strict settlement by will is, to devise to the eldest son for life, with remainder to his first and other sons *severally and successively, and to the heirs male of *291 the bodies of such first and other sons; remainder to the other sons of the testator in the same manner. (*e*)

41. A person devised his estate to his son for life, and after his decease to the male children of the said son, successively, one after another, as they were in priority of age, and to their heirs; and in default of such male children, he gave the same to the female children of the said son, and their heirs; and in case the

(*a*) 2 Atk. 258. Williams *v.* Jekyl, 2 Vez. 681.
(*b*) Dod *v.* Dickenson, 8 Vin. Ab. 451, pl. 25.
(*c*) Fearne, Ex. Dev. 492, Ed. 8.
(*d*) Tit. 32, c. 23.
(*e*) 1 Vent. 231.

said son should die without issue, then he devised the premises to his grandson in fee. (*a*)

It was resolved, I. That the devisee did not take an immediate estate tail by the devise to his male and female children; and II. That under the words, "in case the said son should die without issue," he did not take an estate tail by implication in remainder, after the limitation to his children. (*b*) [1]

42. A will was made in these words: "My will is that my son shall have and enjoy the manor of B. only for his life, and then the premises shall descend and come to his male children, if he have any, for their natural lives only, and to the male children descending from them." (*c*)

It was resolved, that the son took an estate for life only.

43. A person devised a house to his son for his life, and after his death unto all and every his children equally, and to their heirs; and in case he died without issue, he gave the premises to his daughters. (*d*)

It was admitted, that the son took an estate for life only.

44. Where an estate is devised to a person for life, with remainder to his heirs, or to the heirs of his body, and there are *words of explanation* annexed to the word "*heirs*," from whence it may be collected that the testator meant to qualify the meaning of the word "*heirs*," and not to use it in a technical sense, but as a description of the person or persons to whom he intended to give his estate, after the death of the first devisee;

(*a*) Ginger *v.* White, Willes, 348. (*b*) *Ante*, c. 12.
(*c*) Goodtitle *v.* Woodhull, Willes, 592.
(*d*) Goodright *v.* Dunham, Doug. 264. Rex *v.* Stafford, 7 East, 521.

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[1] The testator devised lands to his daughter B. for her life; then to her child or children, if any living at her death, to be equally divided between them; if none living, then to his sons W. and J. for life; then to be equally divided between their children. In like manner he devised other lands to his son W., and other lands to his son J., with the like limitations in each case, in regard to their children, and if none, then over, to the other two devisees, as before. And in a codicil he said, that *if all his children should die without issue of their bodies*, his wife living, the life-estate should go to her during her life, with remainder over to other persons. It was held, that the two sons and daughter took each an estate for life, and that the remainders over were good. Smith *v.* Chapman, 1 Hen. & Munf. 240. This case was argued with great ability and learning, and with extensive research of authorities. See also Birthright *v.* Hall, 3 Munf. 536.

the word "*heirs*" will in that case operate as a word of purchase. (*a*)

45. A person devised to trustees, to the use of and in trust for her sister Margaret Davie and her assigns, during her natural life, without impeachment of waste, remainder to the same trustees to preserve contingent remainders: and from and after her decease, then to the use of and in trust for the heirs male *of the body of the said Margaret to be begotten, severally, successively, and in remainder one after another, as *292 they and any of them should be in seniority of age and priority of birth, the elder of such sons, and the heirs male of his body, lawfully issuing, being always preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies; and for want and in default of such issue, then to the use of and in trust for all and every the daughter and daughters of the body of the said Margaret to be begotten, to be equally divided amongst them, if more than one, share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of such daughter and daughters; and in default of such issue, remainder over. (*b*)

Lord Kenyon said, he had not the smallest doubt upon the case. The intention was most obvious to give the first taker only an estate for life; but if that intention could not be carried into effect, without shaking a positive rule of law, he should certainly bow to the decisions. The case of Colson *v.* Colson, (*c*) went on the same ground, and so afterwards did Perrin *v.* Blake (*d*) in the Exchequer Chamber, where the Judges thought, that after the rule of law in Shelley's case had governed so many subsequent decisions, however imperfect in itself as a rule for construing the intention of a testator, it was necessary to abide by it. That rule, however, was only established to the extent in which it was to be found in Shelley's case, to this effect, that if an estate of freehold be given to a man, and either mediately or immediately, in any part of the same instrument, an estate was limited to the heirs of his body, the latter limitation would unite with the former, and give him an estate tail. But it never had

(*a*) (Dunwoodie *v.* Reed, 3 S. & R. 435, 448. Sewall *v.* Howard, 1 Har. & McHen. 45.)
(*b*) Goodtitle *v.* Herring, 1 East, 264. (*c*) *Ante*, s. 8. (*d*) *Infra*, § 76.

been decided that those words might not be otherwise explained in the will by the testator himself. They were so explained in Lowe *v.* Davies. The estate which was the subject of dispute in that case, came afterwards to a gentleman who was not perfectly satisfied with the decision, and would have canvassed it again. His doubts were founded upon an old opinion which he had discovered of Lord Holt's, that the words, "*heirs of the body*," were so positive to give an estate tail to the first taker, that they could not be gotten rid of by subsequent words. That opinion he had seen, but it was certainly too strait-laced a con-
293 * struction, *and nobody had ever doubted but that the case of Lowe *v.* Davies was rightly decided. That case, however, if it wanted confirmation, had been fortified by the subsequent determination in Doe *v.* Laming; (*a*) the Court there clearly thought that the subsequent words, "*as well females as males*," showed that the testator meant the words, "*heirs of the body*," &c. to be words of description of the persons whom he intended should next take, and not to be words of limitation; and therefore in this case Margaret took only an estate for life. (*b*)

Mr. Justice Lawrence said, the question was whether the words, "*heirs male of the body of Margaret*," were descriptive of the persons whom the testatrix afterwards called "*son or sons;*" for of the intention there could be no doubt. She first gave Margaret an express estate for life, without impeachment of waste, then to trustees to preserve contingent remainders, then, after Margaret's decease, to the heirs male of her body to be begotten, severally, successively, and in remainder one after another, &c. All this was unnecessary, if the testatrix meant to give Margaret an estate tail; but then she went on,—"the elder of such sons and the heirs male of his body to be preferred before the younger of such son and sons;" evidently meaning the same persons whom she had before described as heirs male of the body of Margaret: therefore this fell directly within the case of Lowe *v.* Davies, and was the same as if the testatrix had said, "by heirs male of the body I mean the eldest son and other son and sons of Margaret;" and if she had said so in as many words, it could not be questioned, but that the former words must have had that construction put upon them: now the words made use

(*a*) *Ante*, c. 13, § 43, 44. (*b*) 1 Rep. 104, b.

of were in effect the same. Then the testatrix proceeded to give an estate to the daughters of Margaret in the same manner; that also showed that by the words "*such son and sons*," she meant the same persons whom she had before described as the heirs male of Margaret; for she first provided for the sons, and then for the daughters of the first taker. It was no answer to say, that by this construction, if the eldest son of Margaret had died in the lifetime of the testatrix, leaving a son, the devise would have lapsed, and the grandson been disinherited; for if the obvious meaning of the will was that Margaret should only take for life, they could not enlarge that estate, in order to prevent a possible inconvenience.

*Judgment was given, that Margaret took only an estate *294
for life. And upon a writ of error from this judgment to the House of Lords, the following question was put to the Judges: What estate Margaret Davie took? The Lord Ch. B. delivered their unanimous opinion, that Margaret Davie took an estate for life. Whereupon the judgment was affirmed. (*a*)

46. In a subsequent case, which is nearly similar to the last one, the Court of Common Pleas did not think it could restrain the legal effect of the words "*heirs of the body*," so as to convert them into words of purchase.

47. Lands were devised to trustees and their heirs, to the use of them and their heirs, in trust for the use and benefit of the testator's first son during his life, and also upon trust to preserve the contingent remainders from being defeated or destroyed; and after his decease, to the several heirs male of such first son lawfully issuing, so as the elder of such sons and the heirs male of his body should always be preferred and take before the younger, and the heirs male of his body; and for want of such issue, in trust for his second, third, fourth, and all and every other son and sons, for their respective lives, with remainders as before; and for want of such issue in trust for his first daughter, and every other his daughter and daughters, for their several and respective lives; and also upon trust to preserve the contingent remainders from being defeated and destroyed; and from and after their several deceases, in trust for the several heirs male of their several and respective bodies lawfully issuing, so

(*a*) Printed Cases, 1831.

as the elder of such daughters and the several heirs male of her body should always be preferred and take before the younger of the same daughters, and the heirs male of her and their bodies; with power to the persons who should be entitled to the possession of his said estates to settle jointures. (*a*)

The testator died, leaving a son, and the question, upon a case sent out of Chancery to the Court of C. P., was, what estate that son took under the will?

The Judges of the Court of Common Pleas certified to the Lord Chancellor, that if the devises, contained in the will, to the children of the testator, and their issue, had been devises of legal estates, the only son of the testator would have taken an estate in tail male; there not appearing, upon the whole will together, sufficient indication of the testator's intention to
295* restrain *the legal effect of the words, "*heirs male of the body*," and to convert them into words of purchase.

48. Where *words of limitation are superadded to the word "heir,"* in the singular number, from which it appears to have been the intention of the testator to denote, by the word "*heir*," a new stock and root of inheritance, it will be construed a word of purchase; and the first devisee will only take an estate for life. (*b*)

49. F. Archer devised lands to Robert Archer the father, for his life, and afterwards to the next heir male of Robert, and the heirs male of the body of such next heir male. It was agreed by Anderson, Walmsley, and the rest of the Court, that Robert had but an estate for life; because he had an express estate for life devised to him, and the remainder was limited to the next heir male of Robert, in the singular number. (*c*)

50. A man devised land to Rose his daughter, for life, and if she married after his decease, and had issue of her body, then he willed that her heir, after his daughter's death, should have the land, and to the heirs of their bodies begotten. (*d*)

It appears by the various reports of this case which are stated in 8 Viner's Ab. 213, pl. 4, that the Judges were much divided. Moor says, it was adjudged that Rose had only an estate for life,

(*a*) Poole *v.* Poole, 3 Bos. & Pul. 620. (Malcolm *v.* Malcolm, 3 Cush. 472.)
(*b*) [2 Ves. & B. 371.] (*c*) Archer's case, 1 Rep. 66, b.
(*d*) Clerke *v.* Day, Moo. 593. [S. C. Cro. Eliz. 313. 1 Roll. Ab. 839. Lilly *v.* Taylor, Owen, 148.]

and the inheritance in her heir by purchase, resting in abeyance all her life, and settling in the instant of death. (*a*)

51. Mr. Fearne has observed, that there may possibly be some cases where the superadded words of limitation may be admitted to control the preceding words "*heirs*," "*heirs male*," &c., though in the plural number, when such superadded words limit an estate to such heirs, heirs male, &c., of a different nature from that which the ancestor would take, if the preceding words "*heirs*," "*heirs male*," &c., in those cases, were taken as words of limitation. As in the case put by Anderson, of a limitation to the use of a man for life, and after his decease, to the use of his heirs, and the heirs female of their bodies. Here the first word "*heirs*" would have given a fee to the ancestor, if taken as a word of limitation; whereas the subsequent words, "*and the heirs female of their bodies*," grafted on the word "*heirs*," could give only an estate tail female to the heirs. In such cases the general effect of the first words, "*heirs of the body*," &c., seemed to be altered, abridged, and qualified by such subsequent express words of limitation, annexed to them, as could not possibly be
*satisfied by considering the first words as words of limit- *296
ation. But he observes, we must take care to confine this observation to those cases where the ingrafted words describe an estate descendible in a different course, and to different persons, as special heirs, from what the first would carry the estate to, viz: to males instead of females, or *vice versâ*; for where the first words give an estate tail general, and the words ingrafted thereon are words serving to limit the fee, it seems, by the general and better opinion, that the annexed words of limitation are not to be attended to; as in the case of Goodright *v.* Pullyn, (*b*) and those of Wright *v.* Pearson, (*c*) and King *v.* Burchill, (*d*) where the ingrafted words limited the whole fee. That there does not appear to be the same inconsistency in construing the first words, which describe heirs special to be words of limitation, where the superadded words extend to heirs special; as there is where the first words, and those ingrafted on them, distinguish two different incompatible courses of descent, and would not

(*a*) Poole *v.* Poole, 3 Bos. & P. 620. Amb. 459.
(*b*) *Supra*, s. 18. Doe *v.* Ironmonger, *supra*, c. 10, § 41. (*c*) *Supra*, § 30.
(*d* (*Supra*, ch. 9, § 36.

carry the estate to the same persons. In the latter case, it is absolutely impossible, by any implied qualification, to reconcile the superadded words to those preceding them, so as to satisfy both, by construing the first as words of limitation; whereas in the former case, the superadded words are not contrary to, or incompatible with the preceding, but in their general sense include them; and there is no improbability in the supposition, that they were used by the testator in the same qualified sense as the preceding; and then both may be satisfied, by taking the first as words of limitation. (*a*)

52. Where the remainder is given to the heir of the first devisee, *for the life only of such heir*, the first devisee will take no more than an estate for life.

53. Francis Harvey devised in these words,—"I give to my son, Frank Mildmay, my farm called East House Farm, &c., to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part, if he should marry; and after his death and jointure, if any be made, to the heir male of his body lawfully begotten, during the term of his natural life;† and for want of such heir male, I give the said farm to my son, Carew Mildmay, &c." (*b*)

297 * * It was agreed, that the limitation to F. M. to enjoy and take the profits during his life, and after his decease to the heirs male of his body, would make an estate tail. So, if it had been to the heir male of his body in the singular number, where nothing appeared which explained the intent to the contrary; but here the intention appeared to be that such heir male should have the land only for life, which showed that the testator did not intend that those words should be taken as words of limitation; and nothing appeared in the nature of the expression which imported that they should be taken so. Heir male, or next heir male, were words of purchase; and in this case, where the devise was to F. M., and after his decease to the heir male of

(*a*) Fearne, Cont. Rem. 182, Ed. 8, 1 Rep. 95, B. (*b*) White *v.* Collins, 1 Com. R. 289.

† [In Doe *v.* Stenlake, 12 East, 515, where the devise was to A and her *heirs*, (she having two children before, and one born after making the will,) *during their lives;* it was decided that the latter words were repugnant to the others, and that A took an estate of inheritance.]

his body, during his life; the express limitation during his life, showed that he intended his son should have it in remainder for his life only: and when he devised it over for want of such heir male, to C. M., this did not import that C. M. should not have it till T. M. died without heirs male generally, but for want of such heir male, who was to have it for life. (*a*)

54. Where an estate is devised to a person for life, remainder "*to his issue*," † with *words of limitation superadded*, the word "*issue*" will in that case be considered a word of purchase. (*b*) [1]

55. Sir Michael Armyn devised certain lands to Evers Armyn for life, and in case he should have any issue male, then to such issue male, and his heirs forever; and if he should die without issue male, then he devised over. (*c*)

It was agreed by all the Judges of the Court of K. B., that Evers Armyn had but an estate for life, and that the issue male of Evers Armyn, if there had been any, would have taken a fee by purchase. For, first, they held that though the word *issue* was sometimes construed as *heirs*, and as a word of limitation, yet in a devise it might be a word of purchase as well as of limitation. When it was taken as a word of limitation, it was collective, and signified all the descendants in all generations; but when it was taken as a word of purchase, it might denote a particular *person, and be *designatio personæ*. The *298 second question then would be, whether the intention of the testator appeared, that the word *issue* should be *designatio personæ*, or whether he designed it to be a word of limitation; and they held, that the testator designed it to be a description of the person. because he added a further limitation to the issue, viz. and to the heirs of such issue forever. (*d*)

(*a*) [Seaward *v.* Willock, 5 East, 198.]
(*b*) Tit. 32, c. 23, s. 28.
(*c*) Luddington *v.* Kime, 1 Ld. Raym. 203.
(*d*) Boothby *v.* Vernon, tit. 5, c. 2.

[† It does not appear to have ever been decided that a devise of a legal estate to A, for life, remainder to his issue, created an estate tail; but in the case of Glenorchy *v.* Bosville which will be stated hereafter, Lord Talbot was clearly of opinion that these words would create an estate tail.—*Note to former edition.*]

[1] Devise to J. G. for his life, and after to all and every the issue of his body, share and share alike, as tenants in common, and the heirs of such issue; held to give J. G. an estate for life only. Greenwood *v.* Rothwell, 5 Man. & G. 628; 6 Scott, N. R. 670; 6 Beav. 492. And see Goymour *v.* Pigge, 8 Jur. 526; Williams *v.* Caston, 1 Strob. 130; Findlay *v.* Riddle, 3 Binn. 139.

56. A will was made in these words,—"To the intent that all my lands should remain in my name and blood, I devise to J. S. my near kinsman, such and such lands, &c., to have and to hold for the term of his natural life only, without impeachment of waste; then to the issue male of his body lawfully to be begotten, if God shall bless him with such issue; remainder to the heirs male of the body of that issue." (*a*)

Lord Ch. J. Parker delivered the opinion of the whole Court that the devisee was made tenant for life, remainder to the issue in tail. The words of the will, he said, were so express to this purpose, that neither any words that could have been used, nor any arguments, could make it plainer: this he said was both the obvious and the legal sense of the words, and what they would have imported in a conveyance. (*b*)

57. J. Newson devised a moiety of certain lands, after the death of his wife, to his daughter Susan, during the term of her natural life, and after her decease, to the issue of her body lawfully begotten, and their heirs forever. Susan had one daughter born before the will was made, and two born after. (*c*)

Lord Kenyon said, that in a will, *issue* was either a word of purchase, or of limitation, as would best answer the intention of the devisor: though in the case of a deed, *issue* was universally taken as a word of purchase. Therefore, without disputing any of the former cases, but, on the contrary, in confirmation of them all, and relying upon them for the foundation of this judgment, namely, that the intention of the devisor must prevail, he was of opinion that the devisor, in this case, used *issue* as a word of purchase, and consequently that Susan took an estate for life, and her children took an estate in fee simple.

Judgment was given accordingly.

58. It has been stated, in Chap. XII., that where a testator appears to have had a particular intent, and also a general intent, both of which cannot, by any mode of construction, be
299* carried *into effect, the courts will *construe the will in such a manner as to effectuate the general intent*, though by that means the particular intent be defeated.

(*a*) Backhouse *v.* Wells, 10 Mod. 181. [See also Macnamara *v.* Ld. Whitworth, Cooper, 241.]

(*b*) *Vide* Sparrow *v.* Shaw, *ante*, v. 12, § 49.

(*c*) Doe *v.* Collis, 4 Term R. 294.

59. A person devised lands to A, for his natural life, and after his decease he gave the same to the issue of his body lawfully begotten, on a second wife; and for want of such issue, to B and his heirs forever. Provided that A might make a jointure of all such premises to such second wife. (*a*)

Lord Hale was of opinion, that this was an estate tail in A; and though the three other Judges of the Court of K. B. were of a contrary opinion, yet upon error brought in the Exchequer Chamber, the judgment was reversed, and Lord Hale's opinion established.

60. John Blunt devised an estate to his cousin, John Harris, to hold the same during the term of his natural life, and from and immediately after the determination of that estate, he gave the same to the issue male of John Harris, lawfully begotten, and to his and their heirs, share and share alike; and for want of such issue, then he gave the same to the issue female of John Harris, lawfully begotten, to her and their heirs, share and share alike, if more than one, and for want of such issue, then he gave the same unto his cousin, William King, his heirs and assigns forever, with a condition, that if the said John Harris, or his issue, should at any time thereafter alienate, mortgage, or incumber, or otherwise defeat the bequests thereby made, that then he, the said John Harris, and all and every other person so alienating, mortgaging, or defeating the same bequests, should pay £2,000 to the person or persons, or their heirs, who ought next to take by virtue of the limitations thereinbefore given. (*b*)

Lord Keeper Henley said,—"The first argument was that *issue*, technically, is a word of purchase, and words of limitation being added, the devise was to the issue of John Harris, after his death in fee; and it was compared, among other cases, to Luddington *v.* Kime, Salk. 224. But the true answer to that is, I. That there is no technical word in a will; if the testator's intent be plain, the Court will modify and effectuate his expressions. II. That the case has no resemblance to Luddington *v.* Kime, because there the remainder was expressly contingent;—"to A for life, and in case he have any issue male, to such issue male and his heirs forever; and if he die without issue

(*a*) King *v.* Melling, 1 Vent. 225, 232. 2 Lev. 58. 2 P. Wms. 472.
(*b*) King *v.* Burchell, 1 Eden, 424.

300* male, *then to B and his heirs forever." There the context necessarily supplies, "without (having) issue male." And to make *issue* a word of purchase in that will, the Court held that *issue* was to be taken there as *nomen singulare*, because the inheritance was annexed to the word *issue*. Here it is expressly used in the plural number, to his issue and their heirs; so that if he intended the issue to take as purchasers, he intended them to take as joint-tenants; and if John Harris had ten sons, and the youngest survived, the nine elder and their issue should be disinherited, which is an intent too absurd to be supposed.

"It is manifest to me that the testator intended the word *issue* as a word of limitation; because he intended that William King should take the estate for want of issue male of John Harris, whenever that default of issue happened; and there is not a color to say, in grammatical, critical, or liberal construction, that there is any period in which that want of issue is restrained; and here is a plain limitation of the whole fee in particular estates and remainders.

"But then it is said, here are words of limitation superadded to the word *issue*, and if *issue* is taken as a word of limitation, the words, *and their heirs*, are nugatory. It is true, that the best construction of deeds and wills is to give every word an effect, if it can receive it consistently with other parts of the deed or will; and therefore, in the case of Backhouse *v.* Wells, (*a*) where the devise was to B for his life only, and from and after his decease, then to the issue male of his body lawfully to be begotten, if God shall bless him with any, and to the heirs male of the body of such issue, and for default of such issue remainders over. There was the negative word *only*, and issue was collocated so as to import *nomen singulare;* and the Court was at liberty to take it as a limitation to the first and every other son of such issue. But in the case of Shaw *v.* Weigh, (*b*) where issue was used in the plural number; in Legate and Sewell, (*c*) where *heirs* was used in the plural number: and in both cases words of limitation superadded; the Courts were of opinion that the first limitation carried an estate tail; and yet the latter words of limitation were, by that construction, rendered of no effect. And there is not a case in the books where *issue* or *heirs* have

(*a*) *Ante*, s. 55. (*b*) *Ante*, c. 12, s. 49. (*c*) *Ante*, s. 19.

been used in the plural number, and words of limitation added, that they have been taken as words of purchase; but, on the * contrary, *heir* in the singular number has, and *issue* * 301 may, from the context, be construed words of limitation. But, in the present case, I think the proviso conditional is a plain declaration of the testator himself that he had given John Harris an estate tail, and that he intended to restrain him from a legal dominion over it. "If the said John Harris or his issue, or any or either of them shall, at any time hereafter, alienate, mortgage, or incumber, or otherwise commit any act or deed whatsoever, whereby to alter, charge, or defeat the limitations, then and in such case, &c. Now, how could John Harris charge or incumber the limitations subsequent, if the testator had given him only an estate for life?

"Wright *v.* Pearson, (*a*) Trin. 1758, determined by me, was, in my opinion, a much stronger case than the present; for there, after a limitation for life, the next limitation was to support contingent remainders; and that, too, was the case of a trust, and I was strongly pressed with the authority of Bagshaw *v.* Spencer. I was, after the best consideration I could give it, and after ransacking all the precedents, of opinion that it was the limitation of an estate tail. I have reviewed my notes, and find it was argued and treated in every respect like the present case. There was, as I remember, an appeal to the House of Lords, which was deserted, and therefore the acquiescence of the bar in that judgment is what makes it, after mature consideration, a considerable authority with me, though it was a judgment of my own. I am therefore of opinion, for the reasons mentioned, and upon the authorities cited, that John Harris took under this will an estate tail."

61. Daniel Dodson devised in these words: I give unto my nephew George Grew, all, &c. to hold for and during the term of his natural life, and from and after his decease, to the use of the issue male of his body lawfully begotten, and the heirs male of the body of such issue male; and for want of such issue male, he gave the premises to his nephew George Dodson, his heirs and assigns forever. George Grew had no child when the will was made. He entered on the premises upon the death of the

(*a*) *Ante*, § 30.

testator, suffered a recovery, and died without issue male. And the question was, whether he took an estate tail, or for life only, under the will. (*a*).

Lord Ch. J. Wilmot said, that though the testator cer-
302* tainly *intended, in the first instance, to give George Grew only an estate for life, yet if he as certainly intended that all his sons should take in succession one after another, (and they could not take in that manner but by lodging an estate tail in George Grew,) then it came to this case—here were two things intended, one, an estate for life to G. Grew, another, an estate in succession to all his sons in tail male, *ad infinitum*. Could they both take place? If they could, they ought; if they could not, then balance the two intentions against one another, and see which was the weightiest and most comprehensive, and give that effect. Courts substitute themselves in the place of a testator, and suppose the question to have been asked him,—you have willed two things which cannot both be obeyed exactly, according to your will; and therefore one must yield to the other. What must have been the answer?—I wish to be obliged in the principal, capital, and most material destination I have made, and to reject the secondary and subordinate one.

There were three points to be considered. I. If he intended a successive inheritance to all the issue male of G. Grew *ad infinitum*. II. Whether that intention could take place, if G. Grew had only an estate for life. And III. If it could not, then which of the two intentions must govern the construction. That is, if the words *for life* must give place; or the words expressing an intention of giving a successive inheritance to the issue male of G. Grew.

As to the first point, the will was clear; the remainder to Dodson was not to take place while any issue male of G. Shaw existed; a general failure of that line was to open the succession to Dodson; and therefore a construction to let him in sooner, would directly encounter the manifest intention of the testator; who was making each of his nephews the distinct root of succession to particular parts of his estate.

It was objected that the word "*issue*" was only descriptive of an individual, and the words, *of the body of such issue male*, was

(*a*) Roe *v.* Grew, Wilm. 272. 2 Wils. R. 322.

in the singular number. *Issue*, in its natural or ordinary signification, mean all; it might be restrained. If "*first*," "*next*," or any other similar words had been used, he might have confined its general meaning; but as it stood in the will, it comprehended all. The word "*body*," in the singular number, was not meant to point out one individual, viz. the first issue, and to exclude all *the rest; but to limit the operation of the devise *303 to one at a time, in a course of succession, and to exclude the issue from taking all together; which might have been more doubtful, if the word had been in the plural number, "*bodies*;" but without express words, the Court would not make an exposition productive of such absurd consequences. If only one son, it must be the first; the existence of a son for a moment determined the limitation; and if ten more sons had been born after, they could not take; but the remainder limited to G. Dodson was to fall into possession, in direct opposition to the will, which said it should take place for want of *such* issue male; *such*;—what? issue male of the body of G. Grew; comprising and embracing every branch arising from him; not one, but all the male line derived from him.

It was also objected, that *issue* was more properly a word of purchase. It was used in the statute *De donis*, without an idea of purchase annexed to it, and it acts in a double capacity, as will best answer the intention; and though it was substituted in the place of the word *heirs*, which was scratched out, and it was fairly argued that he might intend it as a word of purchase, yet it did not carry the argument a jot further than the words *for life* did; for if they took by purchase, they must all take as joint tenants for life, and tenants in common of the inheritance: could that be his intention? For if he had ten sons, and nine left issue, the tenth must have the whole estate by survivorship; and when all were dead, then the estate must break into ten parts, and there could be no cross remainders; so that when there was a failure of issue of one son, that part must go over to Dodson, when no part was intended to go to him whilst there was any issue male of the body of G. Grew. He intended all to take, but in course of succession. II. Could this intention take place, if G. Grew took only an estate for life? It might, by construing the word *issue* to mean first and every other son in

succession; suppose he had said I mean by *issue*, first and every other son, it must have been so expounded, because words were only pictures of ideas upon paper; and therefore if he put a meaning on the word himself, it must be understood as he meant it. But he had not said so, and therefore he left the word to act in its own natural character; and in that case, it would not endure to be expounded, first and every other son in
304* *succession; for *ex vi termini*, it meant all, and had not an eye of successive priority in it; and there was no case where it was ever construed to mean, first and every other son in succession; and to create a series of contingent remainders, one after another, which it must do, or the principal intention of the testator be disappointed. And when it is descriptive of the estate, and operates as a word of limitation, and gives an estate tail, it is not the word, but the law, which regulates the descent to all the sons successively, upon its own favorable principles of primogeniture.

It had been argued, that if we could collect from the will that he meant first and every other son in succession, why not construe it so, and thereby complete every part of the intention? Because it would be doing violence to the word "issue," and forcing it out of its known established sense, when the meaning of the testator might be as effectually complied with, by giving it one of its natural energies as a word of limitation; and though the intention collected from the will was to govern the construction, yet there must be words used which were fit and proper for that purpose. It would confound the use of all language, and introduce the greatest barbarity and confusion, to make words stand for ideas, in opposition to the sense which usage had put upon them; and as a word of limitation, it did not defeat the estate for life; for, without fine or recovery, which was not to be presumed, an estate tail was only an estate for life.

As to whether the words, *heirs male of the body of A*, operating as words of purchase, would have the same effect, and take in all the issue male of A, as effectually as if they operated as words of limitation; he admitted, upon the authority of Co. Lit. 26 b. and the case of Southcot *v.* Stowell, 1 Mod. 226, 237, and Freeman's Reports, 216, 225, that when an estate once vests in an heir male of the body of A, by purchase, any

other heir male of the body of A may take by descent: and the reason seemed to be, because it is *quasi* an estate tail from A, and the will of the donor gave it a descendible quality, after it was once vested, as to all the lineal male descendants from A, as well as to all the lineal male descendants of the first purchaser. But still, it would not have the same consequence as if they acted as words of limitation; for suppose A had a son who died in his father's lifetime, leaving daughters, and A had other *sons, they could never take at all, for the second *305 brother could not take, because he was not complete heir: whereas if it was an estate tail, it would descend upon the second son, and take in all the descendants; and it was impossible to make it equivalent to a limitation to the first and every other son, without violating and confounding the legal operation of words, and producing consequences not warranted by the will; for upon a limitation to the first and every other son, the remainders would vest the instant the sons were born, and when a son was of age, he might, by a fine, bar all his issue. But where the limitation was to the heir male of the body of A, no estate vested till A died: and if there were no trustees to preserve, &c., A might bar the remainders, at any time after the sons were born, as well as before. And a fine levied by his eldest son would not bar his issue, if he died before the father; because the issue would take by purchase, and not from his father. (*a*)

III. Which intention ought to take place? If the testator had put the issue and remainder-men into the power of G. Grew, it was not to be presumed he would defeat them. If he had given contingent remainders to the issue, and they were to take by purchase, he might defeat the issue before they were born. If estate tail, a chance. If confined to one issue only, the rest had no chance; better to have a chance of something; the remainder was of no estimation after an estate tail, vested or contingent, *quacunque via.* But suppose the question asked,—"You meant a strict settlement, with trustees to preserve contingent remainders, but the words will not warrant the expounding the will in that manner. G. Grew must either take an estate tail, which will let in all his issue male, but with a power of defeating them and George Dodson, or an estate for life, which

(*a*) *Vide ante*, tit. 32, ch. 22.

will let in G. Dodson in exclusion of the sons of G. Grew!" His answer must have been; I do not intend G. Dodson any thing, while there is issue male of G. Grew. It was certainly the intention of the testator that G. Grew's sons should take in succession, which they could not do, if he was only tenant for life; he therefore took an estate tail.†

306 * * The other Judges concurred, and judgment was given accordingly.

62. A will was made in these words:—To William, one of the sons of my sister Ann Wright, to hold for and during the term of his natural life, he keeping the same in tenantable repair, and from and after his decease to the heirs of the body of the said William lawfully issuing, in such shares and proportions as the said William in and by any deed or writing, deeds or writings, or in and by his last will and testament in writing, to be by him duly executed in the presence of three or more credible witnesses, shall give, direct or appoint. And for want of such gift, &c. then to the heirs of the body of the said William lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue to my right heirs forever. The Court of King's Bench held that William Wright took only an estate for life, and his children only estates for life; but upon a writ of error, this judgment was reversed by the House of Lords, who held

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[† To the three preceding cases the following may be added, forming a class of cases closely resembling those before noticed, where after an estate for life the words heirs of the body, with superadded words of limitation, received a similar construction. Denn *v.* Puckey, 5 T. R. 299, where the devise was to A for life, sans waste, after his decease to the *issue* male of his body, and to the heirs and assigns of such issue male forever, and for default of such issue male to B.—Frank *v.* Stovin, 3 East, 548, where the devise was to A for life, with a power of jointuring, with remainder to the *issue* male of A's body, and their heirs. Mogg *v.* Mogg, 1 Mer. 654, in which the devise was to the child or children begotten or to be begotten of S. M., during his, her, and their life and lives, and after the decease of such child and children, unto the lawful issue of such child and children of S. M., to hold unto such issue, his, her, and their heirs as tenants in common with survivorship.

The following class of cases bears a resemblance to that before noticed, § 21, 24, where words of modification inconsistent with an estate tail, were superadded to the words "heirs of the body." Doe *v.* Applin, 4 T. R. 82, and Doe *v.* Cooper, 1 East, 229, before stated, pp. 251, s. 51, 253, s. 53; see also Murthwaite *v.* Jenkinson, 2 Bar. & Cr. 359; 3 Bar. & Cr. 191; S. C. 2 Bro. & Bing. 623.]

that William Wright took an estate tail, upon the general intent. (*a*)

63. The Court of Chancery has deviated from the rule in Shelley's case, where a testator has created *an executory trust*, by directing a conveyance to be made, and the Court has been called upon to give directions respecting such conveyance; and has so far departed from that which would be the legal operation of the words limiting the trust, if reduced to a common-law conveyance, as to construe the words "*heirs of the body*," although preceded by a limitation for life, as words of purchase, and not of limitation. But this has been done only in cases wherein it *appeared, from some clause or circumstance *307 essentially repugnant to the nature of an estate tail, that the devisor could only intend to give the first devisee an estate for life; and that he used the words "*heirs of the body*," for the purpose of describing the persons to whom he meant to give the estate, after the death of the first devisee. (*b*)

64. The Countess of Sheppy devised her real and personal estate to trustees and their heirs, for payment of debts and legacies; and afterwards to settle the remainder, and what should remain unsold, a moiety to her son Henry and the heirs of his body by a second wife, and in default of such issue to her son Francis and the heirs of his body; the other moiety to her son Francis and the heirs of his body, with remainders over; taking special care in such settlement, that it should never be in the power of either of her said sons to dock the entails of either of the said moieties given to them as aforesaid, during their or either of their life or lives. (*c*)

The question was, whether Francis and Henry were entitled to have an estate tail conveyed to them, or only an estate for life.

Lord Cowper decreed, that the sons must be made only tenants for life, and should not have an estate tail conveyed to them, but their estate for life should be without impeachment of waste; because here an estate was not executed, but only executory;

(*a*) Jesson *v.* Wright, Bligh's Rep. Dom. Proc. vol. 2, p. 1. [*Supra*, s. 22.] [Doe *v.* Featherstone, 1 B. & Adol. 944.]

(*b*) Stamford *v.* Hobart, 3 Bro. Parl. Ca. 31.

(*c*) Leonard *v.* Earl of Sussex, 2 Vern. 526.

and therefore the intent and meaning of the testatrix was to be pursued; she had declared her mind to be that her sons should not have it in their power to bar their children, which they would have if an estate tail was to be conveyed to them; and took it to be as strong in the case of an executory devise, for the benefit of the issue, as if the like provision had been contained in marriage articles. (*a*)

65. In a case which has been already stated, the sum of £10,000 was devised to trustees, to be laid out in a purchase of lands, to be settled in the same manner as certain lands which the testator devised by the same will; that is to say, to B for life, without impeachment of waste, and from and after the determination of that estate, to trustees and their heirs during the life of B to preserve contingent remainders, remainder to the heirs of the body of B, with remainder over, with a power to B to settle a jointure. (*b*)

308* *Lord King held, that as to the lands devised, B took an estate tail, it being within the rule in Shelley's case; but as to the other point, he declared the Court had a power over the money directed by the will to be invested in land; that the diversity was where the will passed a legal estate, and where it was only executory, and the party must go to the Court of Chancery in order to have the benefit of the will; that in the latter case, the intention should take place, and not the rules of law; so that, as to the lands to be purchased, they should not be limited to B for life, with power, &c., remainder to the heirs of his body; but to B for life, with power, &c., remainder to trustees during his life, to preserve contingent remainders, remainder to his first and every other son in tail male, remainder over.

66. Joseph Ashton, by his will, gave £1,200 in money, and £6,000 South Sea annuities, in trust, as soon as conveniently might be after his death, to sell the same; and lay out the money in a purchase of lands of inheritance, to be conveyed to G. I. Ashton for life, and after his death, to the issue of his body, lawfully begotten, and for want of such issue to H. Ashton in fee. G. I. Ashton brought his bill for the performance of this

(*a*) Tit. 32, c. 23.
(*b*) Papillon *v.* Voice, *ante*, s. 5.

trust; and at the hearing of the cause, one question was, what estate the plaintiff ought to take in the lands to be purchased, whether for life only, or in tail; it being insisted on his part, that had this been a devise of the lands, he would clearly have been tenant in tail, and the trust ought to receive the same construction. (*a*)

Sir Joseph Jekyll held, that he ought to be made tenant for life only of the lands to be purchased: and decreed that they should be conveyed to the plaintiff for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail general, with remainder to his daughters in tail, as tenants in common, and not as joint tenants, with cross remainders between them, with remainder in fee to H. Ashton.

67. Sir T. Pershall devised all his real estate to trustees, upon trust, to convey the same to the use of his niece Arabella (who afterwards became Lady Glenorchy,) for life, without impeachment of waste, remainder after her death to her husband for *life, remainder to the issue of her body, with *309 several remainders over. (*b*)

This case first came on before Lord King, who took time to advise, and to have the opinion of the Judges. It afterwards came on before Lord Talbot, who after long argument and deliberate consideration, held that Lady Glenorchy was entitled only to an estate for life, with remainder to her husband for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail, and decreed a settlement accordingly.

68. A. Meure devised all his lands to trustees and their heirs, in trust to sell the same, and with the money arising by the sale to purchase other freehold lands, or long annuities or stock; and then in trust to permit the plaintiff and his assigns to receive the interest and profits thereof during his life, and after his decease then in trust for the use of the issue of the body of the plaintiff lawfully begotten; and in default of such issue, the testator devised the principal and interest, arising by the sale of his said estate, to another. (*c*)

(*a*) Ashton *v.* Ashton, Collect. Jur. vol. 1, 402.
(*b*) Glenorchy *v.* Bosville, Forrest, 3. Collect. Jur. vol. 1, 405.
(*c*) Meure *v.* Meure, 2 Atk. 265.

Sir Joseph Jekyll said, the principal question was, whether an estate tail was to be limited to the plaintiff, or an estate for life only. He observed that the case of Glenorchy *v.* Bosville was in point; and he should decree accordingly.

69. Sir T. Sandys by his will directed his trustees to convey a full fourth part of all his freehold lands to the use of his daughter Priscilla, for and during the term of her natural life, and so as she alone, or such persons as she should appoint, should take and receive the rents and profits thereof; and so as her husband should not intermeddle therewith; and from and after her decease, in trust for the heirs of the body of the said Priscilla forever. The principal question was, whether this was a trust executed or executory; for if executed, Priscilla was then tenant in tail, and her husband entitled to be tenant by the curtesy; the contrary, if executory only. (*a*)

Lord Hardwicke said, the question was, how this trust ought to be carried into execution, and in what manner the trustees ought to convey. Priscilla herself was dead, and yet it must be considered what kind of estate the trustees ought to have conveyed to her, if she had been living. First, whether to
310* Priscilla *in tail, or to her for life only. If the conveying an estate tail would have answered the purpose of the testator in his will, then this case need not have been varied from former cases. But he was of opinion, the conveying an estate tail here would have defeated the intention of the testator. To be sure, where an estate had been granted or given by will to A for life, and to the heirs of the body of A, such a devise had been by the common law united so in the first person, as to convey to him an estate tail; the same construction too had prevailed with respect to trust estates; but in the present case there were all sorts of trusts, as to mortgage, sell, &c. But the latter part of the trust was merely executory, to be carried into execution after the performance of the antecedent trusts; the whole direction, therefore, fell on the Court, and they were to direct how the parties were to convey. That the Court had taken much greater liberties in the construction of executory trusts, than where the trusts were actually executed. Decreed, that the estate should be conveyed to Richard Sandys, the eldest son of

(*a*) Roberts *v.* Dixwell, 1 Atk. 607.

Priscilla, and the heirs of his body, remainder to the second son and the heirs of his body.

70. In the case of Austin *v.* Taylor, Lord Keeper Henley observed, it had been said to be a general rule, in the case of an executory trust, that where an estate for life was given, with a limitation to the heirs of the body, the Court of Chancery would take those words to be words of purchase, and direct a conveyance of the estate accordingly. The word "*executory trust*," seemed to him to have no fixed signification. Lord King, in the case of Papillon *v.* Voice, had described an executory trust to be, where the party must come to the Court of Chancery to have the benefit of the will. But that was the case of every trust; and he was very clear that the Court of Chancery could not make a different construction on the limitation of a trust, than courts of law could make on a limitation in a will; for in both cases the intention should take place; and it would be most dangerous to say, that the Court of Chancery, and a court of law, could be warranted in raising different interests from the same words. Yet he was of opinion, that the determinations on those cases which were called cases of executory trusts, particularly the case of Papillon *v.* Voice, were sound determinations. He then states the case of Papillon *v.* Voice, and cites those of
* Leonard *v.* Earl of Sussex, and Brampton *v.* Kynaston, *311
at the Rolls, 1728. The result, therefore, seemed to be, that the rule, with respect to trusts declared, and legal limitations, was the same. But in cases of imperfect trusts, left to be modelled by the trustees, and where, according to Lord Talbot's observation in Glenorchy *v.* Bosville, something is left by the creator of the trust to be done; the trusts ought to be executed in a more careful manner, or in other words, the creator meant they should, and for that purpose had referred it to his trustees. The true criterion was this; wherever the assistance of the trustees, which was ultimately the assistance of the Court, was necessary to complete a limitation; in that case, the limitation in the will not being complete, that was sufficient evidence of the testator's intention that the Court should model the limitations. But where the trusts and intentions were already expressly declared, the Court had no authority to interfere, and make them different from what they would be at law. (*a*)

(*a*) *Ante*, s. 31. 1 Eden, 366.

71. T. White gave all his personal estate to trustees, upon trust to lay out the same in land, to be settled and assured as counsel should advise, unto and upon the said trustees and their heirs, upon trust to and for the use of the plaintiff, and the heirs male of his body, to take in succession and priority of birth; and for default of such issue male, then upon further trust, and to and for the use of his niece, Ann Robertson, in the same manner. And after deducting the costs and expenses of the trust, he orders his trustees to pay the remainder of the interest, dividends, and profits, until the purchase or purchases should be made, to the plaintiff and Ann Robertson respectively, and unto their respective sons and issue male, who should be respectively entitled to the rents of the freehold estates when purchased, by virtue of the limitations aforesaid. (*a*)

Upon a bill for the performance of the trusts, the question was, whether the lands to be purchased should be settled on the plaintiff as tenant in tail; or in strict settlement upon him for life, with remainder to his first and other sons, in tail male.

Lord Northington directed the settlement to be made on the plaintiff for life, with limitations to his first and other sons in tail male. The cause was reheard before Lord Camden, who was clearly of opinion to affirm the decree; and took a distinction between the case where a testator has given complete
312* directions *for settling his estate, with perfect limitations; and where his directions were incomplete, or rather minutes or instructions, and could not be performed in the words of the will. In the former case, the legal expression should have the legal effect, though perhaps contrary to the intention, as in Garth *v.* Baldwin. In the latter case, the Court would consider the intention, and direct the conveyance according to it. Here the intention was very plain; he directed the settlement to be made by advice of counsel, and in succession and priority: he meant something different from an estate tail, when he wanted the assistance of counsel. And though the words, "*in succession and priority*," might have effect, in case the plaintiff took an estate tail, yet they were meant to give an interest to the sons, after the death of the plaintiff; the latter clause put it out of doubt; he there explained his meaning by making use of the words *sons* and *issue*.

(*a*) White *v.* Carter, Amb. 670. 2 Eden, 366.

72. Where the estate given to the *ancestor* is merely *an equitable or trust estate*, and that devised to his *heirs*, or to the heirs of his body, carries *the legal estate*, these two estates will not unite into an estate of inheritance in the ancestor, as they would have done if both had been of the same quality; that is, both legal, or both equitable. (*a*)

73. Mrs. Ellis devised her estates to trustees and their heirs, upon trust to pay debts and legacies; and to pay the residue to the proper hands of her daughter Cecil Fiennes, who was a married woman, for and during the term of her natural life; and from and after her decease, the said trustees should stand and be seised of and in all the said manors, &c. to the use and behoof of the heirs of the body of her said daughter Cecil Fiennes, severally and successively, as they should happen to be in priority of birth and seniority of age, and to the heirs of their several and respective bodies in tail general. (*b*)

The question was whether Cecil Fiennes had an estate tail, or only an estate for life.

Lord King was of opinion that by the words of the will, the use was executed in the trustees and their heirs, during the life of Cecil Fiennes; and that she had only a trust in the surplus of the rents and profits. But by the subsequent words, viz.: that the trustees should stand seised to the use of the heirs of the body of Cecil Fiennes, &c. the use was executed in the *persons entitled to take by virtue thereof; and therefore, *313 there being only a trust estate in the ancestor, and an use executed in the heirs of the body, those different interests could not unite, so as to create an estate tail by operation of law in the ancestor. Upon an appeal to the House of Lords, the decree was affirmed. (*c*)

74. Lands were devised to trustees, upon trust that they should every year, after deducting rates, taxes, &c. pay such clear sum as should remain to A. B. during his natural life, and after his decease to the use and behoof of the heirs male of the body of the said A. B. lawfully begotten, as they should be in priority of birth; and in defanlt of such issue, remainder over. (*d*)

(*a*) (*Ante*, tit, 22, c. 23, § 26. Roy *v.* Garnett, 2 Wash. 9.)
(*b*) Say and Sele *v.* Jones, 3 Bro. Parl. Ca. 113. 8 Vin. Ab. 262.
(*c*) Tit. 12, c. 1. [Playford *v.* Hoare, 3 Yo. & Jer. 175.]
(*d*) Shapland *v.* Smith, 1 Bro. C. C. 75. [Fearnes, P. W. 421. Doe *v.* Simpson, 5 East, 162.]

Lord Thurlow was of opinion, that A. B. took only an equitable estate; and the subsequent estate being executed, created a legal remainder in tail, which could not unite; and therefore A. B. was only tenant for life. (*a*)

75. A person devised to trustees and their heirs, upon trust to take and receive the rents, issues, and profits thereof, and to apply the same for the subsistence and maintenance of his son during his life; and immediately from and after the decease of his son, the testator gave and devised the said premises unto the heirs of the body of his said son. (*b*)

It was held, that as the estate devised to the son for his life was merely an equitable one, and the remainder to the heirs of the body of his son was a legal one, the son took only an estate for his life.

76. Thus stood the doctrine respecting the application of the rule in Shelley's case, in the construction of wills; when the case of Perrin *v.* Blake arose upon a devise made in the following words:—"And should my wife be *ensient* with child at any time hereafter, and it be a female, I give and bequeath unto her the sum of £2,000 current money of this island, and to be paid her when she attains the age of twenty-one years, or day of marriage, which shall first happen; and to be generally educated and maintained out of my estate, till her portion becomes payable, without any deduction of the same or any part thereof. And, if it be a male, I give and bequeath my estate both real and personal, equally to be divided between the said infant and my son John Williams, when the said infant shall
314* * attain the age of twenty-one. *Item*, and it is my intent and meaning, that none of my children should sell and dispose of my estate for longer time than his life: and to that intent I give, devise and bequeath, all the rest and residue of my estate *to my son John Williams, and the said infant, for and during the term of their natural lives, the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural lives of my said sons John Williams and the said infant; the remainder to the heirs of the bodies of my said sons John Williams and the said infant, lawfully begotten, or to be begotten;* the remainder to my daughters, for and during the term of their

(*a*) Tit. 12, c. 1. (*b*) Silvester *v.* Wilson, 2 Term R. 444.

natural lives, equally to be divided between them; the remainder to my said brother-in-law, Isaac Gale and his heirs, during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters, equally to be divided between them." (*a*)

The testator died, leaving the said John Williams his only son and heir, and three daughters. The testator's wife was not *ensient* at his death; and Isaac Gale, the devisee in trust in the will, died before the testator.

This case was argued in the Court of King's Bench in Easter Term 9 Geo. III. and in the Trinity Term following; and in Hilary Term 10 Geo. II. the Judges delivered their opinions *seriatim.*

Mr. Justice Willes said there were two questions—I. What appeared to be the intention of the testator? II. Was that agreeable to the rules of law? The intention was apparent from the introductory clause, which governed the whole will. The devise to Isaac Gale was a further proof of the intent. From every part of the will it appeared that Gale was meant as a trustee to preserve contingent remainders. After the devise to Gale, he gives it to the heirs of the body of his son. If he could give an estate for life to one, and the inheritance to the heirs of the body of the first devisee, and if his intention appeared to be so, he should think that that intention must control the legal sense of the words, "*heirs of the body.*" The rule contended for, which was in Shelley's case, was pronounced by Lord Coke upon a deed, and in argument; and though he should be for adhering to it in every case literally within it, yet it must not be extended an inch. The maxim itself grew with feudal policy, and the reasons of it were antiquated. The logicians say, *cessante causâ* *315 *cessat effectus*, and surely the lawyer may say— I will confine an old rule within its exact bounds, and extend it as little as possible. Having then stated many of the preceding cases, he concluded that the intention of the testator must prevail, which being to give an estate for life only to John Williams, in his opinion he took such an estate only.

Mr. Justice Aston said, they were now examining a testator's will, and deciding upon the devises in that will. The first and fundamental rule of law in point was, that the intention of the

(*a*) Case of Perrin *v.* Blake, Col. Jur. vol. 1, 283.

testator was to be collected and allowed, though not expressed in any legal language. The intention was clearly to give an estate for life, and where the intention is clear it should govern. But it was objected, first, that in Shelley's case, it is laid down — That if the ancestor takes for life, and in the same instrument an inheritance be limited to the heirs of his body, the first takes the estate tail. Secondly, that the testator had made such a devise in the very words in this case; that no words of limitation were superadded to the words devising the inheritance; that the devise was of a legal estate, not of a trust; and therefore that the legal sense of the words would supervene the intention, however plainly expressed. As to the first, he admitted the rule in Shelley's case to be law, but he denied the consequence, that it was an invariable rule to be applied on every devise. It was an old rule of feudal policy, the reason of which was long since antiquated, and therefore it must not be extended one jot.

The word *heirs* was a term of art; it was necessary to be used in a deed, but not in a will. So in the case of estate tail; in a deed they must be created by using words of procreation, as, heirs of the body. But *proli*, *semini*, *issue*, or *children*, would do in a will; from whence it followed, that a testator need not use terms of art. The argument now was, since he had used them, they must have their due influence. But it was no conclusive argument; when the law permitted an intention to be freely communicated, no reason could be given why terms of art should not be got over. Sir Joseph Jekyll, in Papillon *v.* Voice, said the intention, if lawful, shall govern. Lord Talbot observed in Glenorchy *v.* Bosville,—the rule of law is not so strict as to control the intent. In Sayer *v.* Masterman, Lord Commissioner Willes observed, that the intention should always govern; and that case was determined on the non-appearance of intent.

316 * Lord * Keeper Henley concurred in this opinion, observing that such was not an arbitrary opinion, but consonant to justice and reason; that if the intent appeared, the testator need not be tied down to legal construction. As to superadded words of limitation, upon the words devising the inheritance, whether singular or plural, they were immaterial, the true ground of inquiry being the intention.

The next argument was, that it was not a trust, but a legal devise. He saw no grounds for the distinction between trusts

and legal estates, nor did he think it established. It was laid down in several cases, that courts of law must decide upon intent, as well as courts of equity. Courts of equity had frequently upon trusts, decreed estates tail, and this upon a very substantial ground, because the intent of the parties had not been sufficiently explained to contravene the legal operation of the words.

Lastly, the words restraining the introductory clause signified nothing; the whole clause was explanatory of intention, which was consistent with the devises in the other parts of the will. And to show this, the case of Leonard *v.* The Earl of Sussex was a respectable authority: there, an estate tail was actually devised, and the restrictive clause, that the son should not aliene, was holden only as explanatory. So, in the present case, the clause restraining the power of alienation in the first place, could not in strict language be called a restraint on the tenant in tail; and as it was in a will, it must be expounded only as indicating the intention: and therefore, upon the whole of the case, he thought that the son, John Williams, took only an estate for life.

Mr. Justice Yates said, he allowed that upon the construction of a will free scope was to be given to the intention; it was to be collected from various parts, and the whole scheme and design were to indicate the intention: but the intention must be manifestly clear, and likewise fully consistent with every rule of law. There were cases to be met with, even of trusts, where the testator had holden forth strong marks of his intention, and yet because the legal words which he had used bore in legal language a contrary import, the intention gave way to the superior influence of law. After you have fixed the intention, it then becomes a question whether such intention can be executed *consistently with the established rules of law; if *317 it cannot, we had better adhere to the law, and let a thousand testators' wills be overthrown. In considering the question, it was necessary to fix the point. This was a devise of a real estate to John Williams, &c.; here was no trust executory, no future conveyance to be made, every thing depended on the limitations in the will itself. It was an axiom in our law, that wills were to be construed according to the intention. This axiom was used at the bar in the fullest sense, and it was said,

that the intention of the testator, if legal, should be carried into execution, and allowed, in whatsoever words he should have explained such intention. But he could not accede to so unbounded a position; he agreed, that in the case of an executory trust it was so; and this out of humanity to the ignorance of a testator, because in this case no rule of law would be violated: but in the case of a legal devise, he conceived the allowing so much favor would overthrow the established law, and endanger property considerably.

In giving his sentiments upon this question, he should endeavor to maintain two propositions: First, That in every devise of a legal estate the construction should be agreeable to the legal rules of construction. Secondly, That the rule laid down in Shelley's case was one of them.

If he should prove successful in these propositions, it would immediately follow that John Williams was tenant in tail.

The rule of law mentioned by several writers was this: A will shall be construed so as to fulfil the intention of the testator, so far as it is consistent with the rules of law. And this was as necessary to the safety and certainty of the rules of property, as not allowing a testator to do that which was illegal. These established rules of construction formed the barriers which kept off uncertainty and vexatious litigations of disputed titles; and this certainty, so desirable, could no longer exist than whilst the courts adhered to established rules of construction.

The favor then shown to a will was this; that barbarous words should be supplied; if the devises were imperfect, a necessary implication should be allowed; but if the limitations were perfect, there was no occasion for assistance, and the expressions used must have their legal effect. These technical expressions were the measures of property in legal devises; and
318* the law *having fixed a determinate meaning to them, will not permit their sense to be perverted, but directs the Judges ever to adhere to them without the smallest departure.

Secondly, That the rule in Shelley's case was one of the rules of construction; it had its origin in the feudal policy, and grew up in days when the law favored descents as much as possible. He admitted that the original reason of it had long since ceased, but he denied that for that reason it must be discountenanced, it

having long been the law of the land, and it must continue such till parliament should interpose. But, independent of the feudal law, the rule was reasonable and just, and was applicable to a will as well as to a deed.

Many arguments were used at the bar, to show that this will was not within the meaning of the rule in Shelley's case; and the words being different, required a different rule of construction. The rule did not speak of the word heirs abstractedly, it did not mean to insinuate that there was any magic in the word "*heirs;*" it only speaks of the two limitations. To one for life, to his heirs the inheritance. The first gives an estate of freehold, the second gives the inheritance. The freehold was merged in the inheritance, and the ancestor took the whole estate devised.

He then came to the second head of argument, to examine what difference the words made which were used by the testator in the present case.

First, the preliminary clause.—It was not difficult to show, that the restriction in this clause was void; it was tantamount to saying, "My son shall not convey a greater interest than for life," and he went on to give him an estate which the law calls an estate tail; that restriction was void, for if the same contained a greater estate limited in the one part, than would bear a restriction, the restriction being repugnant was void. In all the cases it was not what estate the ancestor took, but what estate the heirs took. To let them take the inheritance by purchase, they must be particularly designed; and if this was wanting in the present devise, the inheritance could not rest in the issue of John Williams. That individuals must not control the general law, otherwise a door would be opened to uncertainty. Upon principle, as well as upon authorities, John Williams must be regarded as tenant in tail: his father willed that he should take
*for life, and that the heirs of his body should all succeed; this could not be done without making him tenant *319
in tail.

Lord Mansfield said, he always thought, that as the law had allowed a free communication of intention to a testator, it would be a strange law to say—"Now you have communicated that intention, so as everybody understands what you mean, yet because you have used a certain expression of art, we will cross

your intention, and give your will a different construction; though what you meant to have done is perfectly legal, and the only reason for contravening you is, because you have not expressed yourself like a lawyer." That his examination of the question always convinced him that the legal intention, when clearly explained, was to control the legal sense of a term of art, unwarily used by the testator.

It was true, the rule in Shelley's case was laid down as stated, but that rule could never affect this question. The real sense and meaning of that rule was this: If the testator gives an estate for life only to A, remainder to the heirs of A's body; if the Court had said A was only tenant for life, there would have been a contingent remainder to his issue, and then the issue would have been liable to be barred by any forfeiture of the tenant for life; and if he made an estate *pour autre vie*, the remainder was gone: so that the best way of complying with the intention was, to give him an estate tail; by which means the issue were protected by the statute *de Donis;* and if an estate only for life was given, as it could have no use in the world but to cheat the lord of the feudal services, the law very prudently said, that in such cases it should be an estate tail.

This rule was clear law, but was not a general proposition, subject to no control, as where a testator's intention was manifestly on the other side, and where the objections might be answered. He found no cases in Brooke or Fitzherbert where these matters had come in question, so that the Judges were agreed that the intention was to govern, and that Shelley's case did not constitute a decisive, uncontrollable rule. This being settled, the question was, whether in this case the testator had so explained his intention as to control the technical expressions; and he agreed with his brothers that he had. It was known that the intention of trustees to support contingent remainders
320* *was usually attributed to Bridgeman and Palmer since the restoration: then, knowing that these estates might be limited in strict settlement, it was sufficient for the Judges, if it appeared that the testator, (however he had explained himself,) had a strict settlement in his eye, so that from what was said, and from the whole will, he concurred that the intention of the testator was lawful, and such as might be supported. If the intent was doubtful, if it was against law, the legal import of the

words must govern. But here there could not be a doubt, the heirs of John Williams's body were to take as purchasers successively. That he should not content himself with general arguments, if any case could be found establishing a contrary doctrine; which led him to say he agreed with his brethren, Aston and Willes, that there was no case which contravened this general doctrine.

It was true, great reliance was made on Colson *v.* Colson, but this was a very different case. That case might stand; and if ever any future litigation should arise upon a question exactly similar to that, he should submit to Colson *v.* Colson; though, if he was sitting in judgment upon that very will, his determination would have been different. It had been said, that case was law, was the unanimous opinion of the Court, was a respectable authority, and always was deemed such; he could not think so. Denison certainly did not agree with his brothers at first, but as he found them strenuously against him, he was very willing to acquiesce upon the certificate being signed. Lord Hardwicke, speaking of Colson *v.* Colson, confined it exactly within its own bounds; and further said:—"If that case be law;" which was a great deal for him to say; and so little satisfied with it was he, that the last thing he did in Chancery was to send Sayer *v.* Masterman here, and he told him he did it to have Colson *v.* Colson reconsidered. It was said the conveyancers had rested on Colson *v.* Colson.

There was no sound distinction between the devise of a legal estate and of a trust, and between an executory trust and one executed: all trusts were executory; and in every shape that a will appeared, the intention must govern.

He admitted there was a devise to John Williams for life, and, in the same will, a devise to the heirs of his body; and he agreed that this was within the letter of Shelley's case; and he * did not doubt but there were, and had been always * 321 lawyers of a different bent of genius, and different course of education, who had chosen to adhere to the strict letter of the law; and they would say that Shelley's case was incontrovertible authority, and they would make a difference between trusts and legal estates, to the harassing of a suitor.

His opinion therefore was, that the intention being clear beyond doubt, to give an estate for life to John Williams, and an

inheritance, successively to be taken by the heirs of his body; and his intention being consistent with the rules of law, it should be complied with, in contradiction to the legal sense of the words used by the testator, so unguardedly and ignorantly.

Judgment was given, that John Williams took an estate for life.

A writ of error was brought on this judgment, in the Exchequer Chamber; in which the judgment was reversed by the opinion of seven Judges against one; so that, upon the whole, eight Judges were of opinion that John Williams took an estate tail; and four, that he took only an estate for life.

77. Sir William Blackstone's argument on this case, in the Exchequer Chamber, has been published by Mr. Hargrave from his own manuscript, of which the following is an abstract. (*a*)

The great and fundamental maxim, upon which the construction of every devise must depend, is, "that the intention of the testator shall be fully and punctually observed; so far as the same is consistent with the established rules of law, and no farther.

Some rules of law are of an essential, permanent, and substantial kind, and may justly be considered as the indelible landmarks of property; and which cannot be exceeded or transgressed by any intention of the testator, be it never so clear and manifest; such as, that every tenant in fee simple or fee tail shall have the power of alienating his estate, by the several modes adapted to their several interests.

There are also other rules of a more arbitrary, technical, and artificial kind, which are not so sacred as these, being founded on no great principle of legislation or national policy. Some of these are only rules of interpretation or evidence, to ascertain the intention of the parties, by annexing particular ideas of
322* property *to particular modes of expression; so that, where a testator makes use of those technical modes of expression, it is evidence *primâ facie* that he means to express the selfsame thing which the law expresses by the selfsame form of words. Thus, a devise of land to another generally, gives him an estate for life; a devise to a man and his heirs, gives him an estate in fee; to a man and the heirs of his body, an estate tail.

Lastly, there are some rules which are not to be reckoned among the great fundamental principles of juridical policy, but are mere maxims of positive law, deduced by legal reasoning from some

(*a*) Harg. Tra. 487.

or other of the great fundamental principles; such as, that a devise to a man for life, with remainder to the heirs of his body, shall constitute an estate tail.

The rule in Shelley's case is not to be reckoned among the great fundamental principles of juridical policy, which cannot be exceeded or transgressed by any intention of the testator; but is of a more flexible nature, and admits of many exceptions: for if the intention of the testator be clearly and manifestly contrary to the legal import of the words which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator.

The rule of law laid down in Shelley's case is, that where the ancestor takes an estate of freehold, with remainder to his heirs, or heirs of his body, the word "*heirs*" is a word of limitation of the estate, and not of purchase; that is, in other words, that such remainder vests in the ancestor himself; and the heir, when he takes, shall take by descent from him, and not as a purchaser. It was first established, to prevent the inheritance from being in abeyance, and to facilitate the alienation of land.

This rule, when applied to devises, may give way to the plain and manifest intent of the devisor; provided that intent be consistent with the great and immediate principles of legal policy; and provided it be so fully expressed in the testator's will, or else may be collected from thence by such cogent and demonstrative arguments, as leave no doubt in any reasonable mind, whether it was his intent or no.

There is no such plain and manifest intent of the devisor in the present case, expressed, or to be collected from any part of this devise, as may control the legal operation of the words,
* and, at the same time, be consistent with the fundamen- * 323
tal rules of law.

The question is not, whether the testator intended that his son John should have a power of alienation; for he most clearly expressed, that the son should not have such a power. The question is not, whether the testator intended that his son should have only an estate for life; for he believed there never was an instance, when an estate for life was expressly devised to the first taker, that the devisor intended he should have any more. But if he afterwards gives an estate to the heirs of the

tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention, and vests a remainder in the ancestor: (*a*) and therefore, it has frequently been adjudged, that though an estate be devised to a man for his life, or for his life, *et non alitèr*, or with any other restrictive expressions, yet if there be afterwards added apt and proper words to create an estate of inheritance in his heirs, or the heirs of his body, the extensive force of the latter words should overbalance the strictness of the former, and make him tenant in tail, or in fee. The true question of intent would turn, not upon the quantity of estate intended to be given to John the ancestor, but upon the nature of the estate intended to be given to the heirs of his body. That the ancestor was intended to take an estate for life, was certain; that his heirs were intended to take after him, was equally certain; but how those heirs were intended to take, whether as descendants or as purchasers, was the question? If the testator intended they should take as purchasers, then John the ancestor only remained tenant for life; if he meant they should take by descent, or had formed no intention about the matter, then, by operation and consequence of law, the inheritance first vested in the ancestor. The true question, therefore, was, whether the testator had, or had not, plainly declared his intent, that the heirs of the body of John Williams should take an estate by purchase, entirely detached from, and unconnected with, the estate of their ancestor? Or, in other words, whether he meant to put an express negative on the general rule of law, which vests in the person of the ancestor (when tenant of the freehold) an estate that is given to the heirs of his body? It was not incumbent on the plaintiff to
324 * show by * any express evidence, that his testator meant to adhere to the rule of law; for that was always supposed, till the contrary was clearly proved; but it was incumbent on the defendant to show, by plain and manifest indications, that the testator intended to deviate from the general rule; for that was never supposed till made out, not by conjecture, but by strong and conclusive evidence. By a devise to a man's heirs, or heirs of his body, the heirs had never been allowed to take as purchasers, excepting in one of these four cases:—I. Where no estate at all, or no estate of freehold, was devised to the ancestor;

(*a*) 1 Vent. 225, 379.

there the heirs could not take by descent, because the ancestor never had in him any descendible estate. II. Where no estate of inheritance was devised to the heir, as in the case of White *v.* Collins; (*a*) for common sense would tell, that in such a case the heir would not take by descent, as heir. III. Where some words of explanation were annexed by the devisor himself to the word heirs in a will, whereby he discovered a consciousness, distrust, or apprehension, that he might have used the word improperly, and not in its legal meaning, and therefore he in a manner retracts it, he corrects the inaccuracy of his own phrase, and tells every reader of his will how he would have it understood. IV. Where the testator superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he gave the estate; whereby it appeared, that those heirs were meant by the testator to be the root of a new inheritance, the stock of a new descent, and were not considered merely as branches derived from their own progenitor. The evidence of intent, in this case, might be resolved into two particulars; I. The testator's previous declared intention, that none of his children should sell or dispose of his estate for longer term than his own life. II. The interposed estate to Isaac Gale and his heirs, on which much stress could not be laid; for, if that estate had been expressly given to preserve contingent remainders, (which was only a conjecture,) the case of Colson *v.* Colson was an express authority, that this would not make the heir of the body a purchaser. If this was so, the introductory words were the only evidence of intent, and then the result of the whole matter was, that the testator having declared his intent that his son should not aliene his lands, he, to that intent, gave his son an estate to which the law has annexed a power of alienation;—an estate to himself for life, with remainder *to the heirs of his body. Now, what was a *325 court of justice to conclude from hence? Not that a tenant in tail thus circumstanced should be barred of the power of alienation; this was contrary to fundamental principles. Not that the devisee should take a different estate from what the legal signification of the words imported; this, without other explanatory words, was contrary to all rules of construction; but plainly and simply this, that the testator had mistaken the law, and imagined that a tenant for life, with first an interposed estate

(*a*) *Ante*, § 53.

and then a remainder to the heirs of his body, could not sell or dispose of his interest. Upon the whole, he concluded, that though it did not appear that the testator intended to restrain his son from disposing of his estate, for any longer term than his life, and, to that intent, contrived the present devise, yet it did not appear by any evidence at all, much less by declaration plain, that, in order to effectuate that purpose, he meant that the heirs of the body of his son should take by purchase, and not by descent, or even that he knew the difference. The consequence was, that, by the legal operation of the words, which were not controlled by any manifest intent to the contrary, the heir could only take by descent, and, of course, John Williams the son was tenant in tail.

78. It is observable, that in the several cases in which the question has arisen, whether the rule in Shelley's case should be applied to the construction of a will, the objection to its application has always been founded on the obvious intention of the testator, to give the first devisee no more than an estate for life; without considering that in all those cases the testator devises the remainder expectant on the determination of the first estate, to the heirs general, or special, or to the issue of the first devisee, and that it is as necessary to ascertain his intention in the second as in the first devise. There can be no doubt but that, where a common person devises his estate to A for life, with a remainder to his heirs general, or special, or issue, he does not mean to give A any greater estate than for his life; and as to the addition of negative words, or a devise to trustees to preserve contingent remainders, they can add nothing to the clearness of the first words. The whole difficulty, therefore, lies in ascertaining the intention of the testator in the second devise; or, as Sir
326* W. Blackstone says, "the true question of intent *will turn, not upon the quantity of estate intended to be given to John the ancestor, but upon the nature of the estate intended to be given to the heirs of his body;" and where the second devise is inconsistent with the first, to adopt such a construction as will best effectuate the general intent of the testator. It is for this purpose that the rule is applied; upon a principle which has been already stated, (*a*) and which is fully explained by Lord Ch. J. Wilmot, in his very able judgment in the case of Roe *v.*

(*a*) Robinson *v.* Hicks, *ante*, c. 12, § 50.

Grew; (*a*) and by Lord Kenyon in several cases, which have been already stated in Chapter XII.; namely, that where a testator shows a particular, and also a general intent, which are inconsistent with each other, the general intent will be established, and the particular one disregarded.

79. In all the cases where the rule has been applied, there was a devise to A for life, with a subsequent devise to the heirs general, or special, or issue of A; and the testator had a particular intent, to give an estate for life only to A, and a general intent, to give estates to all the lineal descendants of A. If the will were construed according to the particular intent, the first devisee would take an estate for life only, and the word heirs, or heirs of the body, or issue, must operate as words of purchase. But by this mode of construction, the general intent that all the lineal descendants of A should take successive estates of inheritance, either in fee or in tail, would be defeated. For if the remainder was devised to the heirs of A, it must vest in the person who was heir general to A at the time of his death; and in that case, it could not go in succession from him, to succeeding heirs of the same ancestor, not being heirs general of the first heir; but might eventually go to strangers, either in defect or exclusion of the heirs of such ancestor. If the remainder was devised to the heirs of the body of A it would vest in the person who was heir of the body of A at the time of the testator's death, and would descend to the heirs of the body of that heir; and on failure of issue of that person, it would go by a *quasi* descent to the next person who answered that description, at the time of the failure of such issue, in conformity to Mandeville's case; so that if the devisee had several sons, the first would take an estate tail, but none of the other sons would take vested estates, while the eldest or any issue of his body were in existence. (*b*)

If the remainder was devised to the issue of A, the estate *would vest in all his children, as joint tenants for *327 life, and tenants in common of the inheritance. (*c*)

The consequence is, that in order to effectuate the general intent of the testator, which, in the three cases put, certainly is,

(*a*) *Supra*, § 61.

(*b*) Fearne's Cont. Rem. 8th edit. 192. Tit. 32, c. 23, s. 4. Tit. 32, c. 22, s. 36. 1 Inst. 26 b. Morris *v.* Ward, *supra*, s. 20. (*c*) Roe *v.* Grew, *supra*, s. 61.

that the estate devised shall go to all the lineal descendants of the first devisee, in a course of inheritance, and shall not go over as long as there are any such descendants remaining, the Court is obliged to apply the rule, and to construe the second devise in such a manner as to create an estate in fee or in tail in the first devisee. (*a*)

80. This doctrine is fully confirmed by Lord Thurlow, in his determination of the case of Jones *v.* Morgan, (*b*) in which he concluded his judgment in these words—"By all the cases, where the estate is so given, that after the limitation of the first taker, it is to go to every person who can claim as heir to the first taker, the word "*heirs*" must be a word of limitation; all heirs, taking as heirs, must take by descent. In cases where I can bring it to the point, that the testator by the word heirs, as used in the will, means first, second, third, and other sons, there I change the words of the will. But here I think the word heirs was the very thing he meant. Suppose William had had a son, which son had had a son, and died, living William; the eldest son of the son would have been heir; if there had been a title he would have taken it; but the estate, if these had been words of purchase, must have gone to the second son, the devise to the son being a lapsed devise, like the case of Warner *v.* White, (*c*) lately in the House of Lords, from Ireland. But Sir William Morgan meant the estate to go to whoever should be heir. I think the argument immaterial that he meant the first estate to be an estate for life; I take it, that in all cases the testator does mean so; I rest it upon what he meant afterwards. If he meant that every other person, who should be heir should take, he then meant what the law would not suffer him to give, or the heir to take as a purchaser. In conversing with a great authority, whom I will not name, I asked what would become, in the case stated, of the grandson; the answer was, he should take as heir. I know he might, but then he must take by descent; all possible heirs must take as heirs, and not as purchasers. Many cases have been determined on the ground of a devise to the first taker; with a remainder to the heir male in the singular, or heirs
328* male *in the plural, as in King *v.* Burchell, before Lord Henley, where it was in the singular number. (*d*)

(*a*) 8 Term R. 519. (*b*) *Supra*, s. 32. 1 Bro. C. C. 219. (*c*) *Ante*, c. 8, s. 30.
(*d*) *Supra*, s. 60.

"The rule in Shelley's case was used as a demonstration, that it was indifferent whether the limitation was in the singular or the plural number; it was equally an estate tail. So, where it is to the heir of the first taker, and to the heirs of that heir, it has been determined to be an estate tail. Indeed, in all cases where the limitation is of an estate of freehold to a man, and afterwards to the heirs of his body, whether general or special, so as to give it to the heirs as a denomination or class, the heirs shall be in by descent, and not by purchase. And the case stated by Anderson in Shelley's case, of a limitation to the use of A for life, remainder to the use of his heirs, and of their heirs female, is the only one to the contrary; and in that case the word "*heirs*" must be a description of persons, in order to let in the limitations to the heirs female."

81. Mr. Fearne's conclusion to his observations on the rule, appears to have been founded on the same principle; or if not is certainly conformable to it; for he says,—"Wherever the ancestor takes the freehold, the inheritance will not go to all the heirs, &c., in the course of inheritable succession, unless by an actual descent; and consequently if, after the first taker, it is to go to every person who can claim as heir to him, the intended succession can only be effectuated by taking the word heirs, &c., as a word of limitation. If after him all heirs, &c., are to take as such, that is, as answering that description, they can only take by descent. If the law will not admit of all possible heirs, &c., taking the inheritance, after its inception by a freehold in the ancestor, otherwise than by descent, it follows, that wherever the limitation to the heirs, &c., after a freehold to the ancestor, is admitted to reach the whole denomination or class of heirs described, they must take by descent, and not by purchase. (*a*)

(*a*) Fearne Cont. Rem. 8th edit. 196.

CHAP. XV.

CONSTRUCTION—WHAT WORDS CREATE A JOINT TENANCY, OR TENANCY IN COMMON, AND CROSS REMAINDERS.

SECT. 1. *What words create a Joint Tenancy.*
12. *What words create a Tenancy in Common.*
29. *What words create Cross Remainders.*
37. *Formerly not implied between more than two.*
42. *This Doctrine somewhat altered.*

SECTION 1. WITH respect to the *words which create a joint tenancy* in a will, it has been long settled that a devise to A and B generally, or to A and B and their heirs, makes them joint tenants.[1] So, where a man devised lands to his two daughters and their heirs, it was resolved that they took an estate in joint tenancy. (*a*) †

2. Though the estates devised to two or more persons, in this manner, should have different commencements, yet the devisees will take in joint tenancy, as appears from the two cases here cited, and which have been already stated. (*b*)

3. Whenever lands are devised to two or more persons, with a benefit of survivorship among them, they will take as joint tenants; though there be other words in the will indicating an intention to create a tenancy in common.

4. Lands were devised to A, B and C in tail; and then fol-

(*a*) Tit. 18, c. 1, s. 3. Anon. Cro. Eliz. 431.
(*b*) Aylor *v.* Chep. Oates *v.* Jackson, Tir. 18, ch. 1.

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[1] The general rule of law in the United States, is the reverse of this; the devisees being tenants in common. See *ante*, tit. 18, ch. 1, § 2, note.

[† See also Swaine *v.* Burton, 15 Ves. 365, and the cases of bequests of personal estate to legatees as joint tenants, 2 Rop. Leg. 322–329, ed. 1828. Also Morris *v.* Barrett, 3 Yo. & Jer. 384.] (And see Campbell *v.* Heron, Tayl. 199; Cam. & Nor. 291; In re Saunders, 4 Paige, 293; Cholmondeley *v.* Cholmondeley, 14 Sim. 590.)

lowed these words — "I will that every of them be the other's heir, by equal portions. (*a*)

The Court at first held this to be a tenancy in common; but afterwards upon good consideration, it was adjudged to be a joint *tenancy, for so it was implied; and it was as *330 to say, that each survivor should be the other's heir. (*b*)

5. [Where lands are devised to two or more persons generally, or to them and their heirs, the rule of construction is, that devisees take as joint tenants; but where the devise is in tail, the construction is necessarily different. For a devise to two or more persons (who neither are, nor capable of being, husband and wife) and to the heirs of their bodies, as they can have no common heirs of their bodies, of necessity makes the devisees joint tenants *for life*, with several inheritances in tail. Upon the death of any one, his estate devolves upon the survivors for their lives, and upon the death of the surviving joint tenant, the inheritance devolves upon their respective heirs in tail, as tenants in common. (*c*)

6. In a recent case, the devise was to Margaret and Elizabeth, and the survivor of them, their heirs and executors forever; the Court of B. R. decided that the devisees took as joint tenants in fee, and not estates for life with remainder in fee to the survivor.] (*d*)

7. Lord Hale says, a devise to two, equally to be divided between them, and to the survivor of them, makes an estate in joint tenancy, upon the express import of the last words. (*e*)

8. A person devised to Jane the wife of B, and to Elizabeth the wife of C, all his estate, &c., to be equally divided between them, during their natural lives; and after the deceases of the said Jane and Elizabeth, to the right heirs of Jane forever. (*f*)

The question was, whether this devise made Jane and Elizabeth joint tenants for life, so as upon the death of Jane the whole survived to Elizabeth for life; or whether upon the words, equally to be divided between them, they were tenants in common.

(*a*) Fowler *v.* Ongley, And. 194. Webster's case, 3 Leon. 19.
(*b*) Furse *v.* Weekes, 2 Roll. Ab. 90.
(*c*) [Co. Lit. 184, a. Huntley's case, 3 Dyer, 326, a. 2 Vern. 545, per Ld. Keeper.]
(*d*) Doe *v.* Southern, 2 B. & Adol. 628.
(*e*) 1 Vent. 216. [Smith *v.* Horlock, 7 Taunt. 129.]
(*f*) Turkerman *v.* Jeoffrys, 3 Bac. Ab. 681. Holt. Rep. 370.

Lord Holt pronounced the opinion of the Court that they were joint tenants, notwithstanding the words, "*equally to be divided between them*," and the lands ought to survive to Elizabeth. I. Though upon such words generally, they would be tenants in common, yet if it should be so in this case, it would be expressly against the intent of the testator, and would defeat the heirs of Jane of part; for they were to take altogether, and not by moieties, one at one time, and one at another, but all at once; and if they should be tenants in common, they
331 * must take * by moieties, at several times. II. It was express that the heirs of Jane were not to take till after both their deceases. III. If they should be tenants in common, then the heirs of Jane would be in danger to lose a moiety; for as to that one moiety, it must be a contingent remainder; so that if Elizabeth should die during the life of Jane, the contingency for that moiety not happening, it must descend to the heirs at law of the testator, who were Elizabeth and the issue of Jane, as coparceners. IV. Jane and Elizabeth were heirs at law to the testator, and as such, the whole would have descended to them in coparcenary, if no will had been made; but here, by this will, it was plain the testator intended to prefer the heirs of Jane to the whole. Judgment accordingly.[1]

9. Andrew Hawes, the plaintiff's grandfather, devised several lands to his four younger sons, William, Charlton, Andrew, and Thomas Hawes, their heirs and assigns, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship; and also devised all his messuage in Chatham unto his said four children, their heirs and assigns forever, equally to be divided, share and

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[1] A devise of land to A, B and C, and their heirs, to be sold, and the money to be equally divided among them; makes them joint tenants of the land, and tenants in common of the proceeds of the land when sold; the words "*equally to be divided among them*" applying exclusively to the money. Therefore, the heir at law of A cannot maintain ejectment for the land, without proof of the previous deaths of B and C. Goodtitle *v.* Oxley, 7 D. & R. 535.

So, where the testator devised lands to his two nieces, "*equally between them, to take as joint tenants, and their several and respective heirs and assigns forever;*" it was held, that they took estates for life as joint tenants, with several inheritances on the death of the survivor. Doe *v.* Green, 4 M. & W. 226. And see Breedon *v.* Breedon, 1 Russ. & My. 413.

share alike as tenants in common as aforesaid, and not as joint tenants, with like benefit of survivorship; and died leaving his eldest son Harewell Hawes, and the said four other sons. In 1727, Charlton Hawes died an infant and unmarried; and some time after, Harewell Hawes the eldest son, and his wife, by fine and recovery conveyed, *inter alia*, the undivided fourth that had belonged to Charlton, of the lands devised by his father, to the use of such persons, and for such estates, as he and his wife should appoint; and for want of such appointment, to the use of himself for life, remainder to his wife for life, remainder to his own heirs and assigns. (*a*)

In 1728, no appointment being made, Harewell Hawes by will devised all his freehold lands to trustees, in trust to sell so much as should be necessary for payment of his debts; and what should remain unsold, he directed his trustees to convey equally to his three children, the plaintiff Nathaniel, Martha, and Elizabeth, one of the defendants, and their heirs forever, as tenants in common, or to the survivors and the heirs of such survivors, at their ages of twenty-one years; and the rents and profits, after his wife's decease, to be had and received towards
*the education and bringing up of his said three children, *332
during their minorities: and gave his personal estate equally between his three children and his wife, whom he made executrix; and died, leaving the plaintiff his son, and his two daughters, Martha and Elizabeth, the first of which (Martha) died an infant in 1740, and unmarried.

The plaintiff having attained his age of twenty-one, brought his bill to be let into the undivided fourth of his uncle Charlton, which he insisted did, by his death, descend upon his father Harewell Hawes, as heir to Charlton, and was by him well conveyed to the plaintiff by the above settlement and will: and also to be let into the share of his sister Martha, of their father's real estate; insisting that she dying before twenty-one, the share of their father's real estate intended her, upon the happening of that contingency, was now a resulting trust for the benefit of the plaintiff, as heir at law to his father; or that if any thing was actually vested in her, she had it as tenant in common, and upon her death it descended to the plaintiff, as her brother and heir.

(*a*) Hawes *v.* Hawes, MSS. Rep. 1 Wils. R. 165.

There were two questions: — The first between the plaintiff and the defendants his surviving uncles, upon the grandfather's will; whether the four devisees were joint tenants, or tenants in common: if the former, the share of Charlton survived to the defendants the uncles; if the latter, his share went on his death to Harewell Hawes the plaintiff's father, as heir to him, and was by him well conveyed to the plaintiff. The second was between the plaintiff and the defendant Elizabeth his only sister, whether any and what interest vested in any of the children before twenty-one, under their father Harewell Hawes's will.

Lord Hardwicke said, the question arising upon Andrew Hawes's will was, whether there was a joint tenancy or a tenancy in common generally, or a tenancy in common attended with a particular limitation over, either generally or upon a contingency. This was a devise to younger children, a circumstance to be considered, in determining whether they took as joint tenants or tenants in common. The general rules were plain: joint tenancies were not favored in equity, because they did not tend to make proper provisions for families; and though the law favored them formerly, as multiplying tenures, yet as tenures were taken away, the law leaned against them now. Another rule was no
333* *less certain; that if there were many words, and some introductory to others, such a construction was to be made as would render all the words consistent, and to have a meaning if possible; but if that could not be done, and that some words must be rejected, they must be such as were least consistent with the party's intent. But if an uniform construction could be made of all the words, so as that each should have effect, the Court would do it. Here was an immediate devise to the four children in fee, as tenants in common; and the words, "with benefit of survivorship," ought not to receive such a construction as to control the devise, since that would be overruling certain words by ambiguous ones.

There had been two constructions put upon these words, I. As being only descriptive of one quality of joint-tenancy; but that was too refined, and not agreeable to the use the testator had made of these words in other parts of his will; for where he delared the custom of London, as to the orphanage part of his personal estate, and disposed of the testamentary part, he made

use of the words, "with like benefit of survivorship," not to exclude survivorship, but to give it.

The second construction was, that they related to a dying before the testator, which was an admission that they ought to have some construction; and if no other could be found, he did not say that he would not put that construction on them. Though in that case, if any of the children should die before the testator, leaving children, such children could not take, as their father's share would then go over; but in such case, the testator might make a provision for them in his life. But parents seldom provide by their wills for contingencies which may happen in their own life; and strictly speaking, survivorship respects a time after the testator's death, the *jus accrescendi* presupposing an (*a*) actual vesting of the interest in the parties. In the case of Bindon *v.* Suffolk,† Lord Cowper reasoned rightly, that the words could not mean a dying at any time, but at some particular period, which he confined to the testator's lifetime. Indeed, in the House of Lords it was referred to the time of payment. But *still it was referred in both to some particular period; *334 and the debt in that case being desperate, and the division to be made when the debt was paid, the Lords referred the survivorship to the time of the division. Now, the question was, whether upon the whole frame of this will, there was not another period, besides the testator's death, to which it was more natural to refer the words of survivorship. In that part of the will relating to the orphanage share, the testator could not by those words mean a survivorship of himself, the benefit there being to arise after his death, and after the custom should attach. If therefore, one of the children had come to twenty-one, and demanded his share, he must have had it, and if another child had afterwards died an infant, unmarried, the survivors had been entitled. He therefore thought this clause would afford some light towards understanding that in question; for, in the disposition of the testa-

(*a*) 1 P. Wms. 96.

[† That was a case of personal property, being a devise of £20,000 unto five persons, equally to be divided between them, share and share alike, and if either of them died, to the survivors or survivor of them. Held, a tenancy in common, 4 Bro. Parl. Ca. 574. *Vide* Doe *v.* Abey, 1 Maule and Selw. 428.—*Note to former edition.*]

mentary part, there was the same benefit of survivorship intended, as in the orphanage part. The word "*like*," was a word of reference, being the same as if the testator had said, if any one died before twenty-one, unmarried, his share shall go to the survivors; and the point was, what effect this would have upon the other clause. The testator was making a fund for his younger children, the very same as were legatees of the testamentary part, which was expressly given over if any died before twenty-one unmarried; and therefore, he thought the benefit of survivorship, as to the estate in question, must be the same benefit of survivorship which he had directed before as to the personal estate; which was a very natural intention, that if a child should die before he could make use of his share, it should go over to the others. It was said that the word "*like*" was not inserted in this clause; but he thought that was of no weight, he having used the same words in such a sense as to make no doubt of his meaning: and though the making the children joint tenants would certainly overturn many words in the will, yet by construing this to amount to a limitation over upon a contingency, all the words would be consistent; and he thought it the same as if the contingency had been expressly repeated. This was called proceeding by arbitrary conjecture, but he thought it a reasonable intendment; for, which was the most natural construction? that the survivorship should relate to the testator's death, or
335 * mean a survivorship amongst themselves: *and if this construction was right, the case stood clear of all the authorities; and as Charlton died under twenty-one, and unmarried, his share survived to the other three children.

The next question arose upon the will of Harewell Hawes, namely, at what time those shares vested in the plaintiff and his sisters; whether immediately, or upon their attaining the age of twenty-one. When the conveyance was to be made, they must certainly take as tenants in common, for divided shares must be conveyed: and as to suspending the conveyance till the youngest attained twenty-one, he thought it not a right construction; for the words were disjunctive, *when she and they, &c.*, yet he thought the word "*and*" ought to be construed as "*or*," otherwise, the trust of the rents and profits would cease as to each child that attained twenty-one, and he could-

neither have lands nor rents, till the youngest also should attain twenty-one. Now, one of the children dying under twenty-one, the question was, whether her share should descend to her heir at law, or survive; and he thought it survived; and that this clause must be construed in the same manner as if that relating to the rents and profits had been placed first. The will must have the same construction wherever the clauses were placed; and placing them as he just then did, there would have been a joint-tenancy, during their minorities; and if one died under age, his or her part would not descend, but survive to the others, and go towards their maintenance. This gave a light to the time when the conveyance was to be made, and for whose benefit; for if any died before twenty-one, it showed he or she was not intended to take, and that the conveyance was to be made at a limited time, that of their attaining twenty-one; and if the plaintiff had attained twenty-one and died, and then one of his sisters had died under twenty-one, he thought the conveyance of her share ought to be made to the heir of the plaintiff, and the surviving sister, because, as to the plaintiff, the contingency of survivorship would then be over. (*a*)

10. In a modern case, lands were devised, after an equitable estate for life, to the testator's niece Sarah; for the use of the heirs of the body of the said Sarah, lawfully begotten or to be begotten, their heirs and assigns forever, without any respect to be had or made in regard to seniority of age or priority of birth; and the Court of K. B. held, that they took as joint-tenants, *because they were to take together, without *336 regard to seniority of age or priority of birth. (*b*)

11. It has been stated in a preceding chapter, that where there are two different dispositions of the same estate in a will, the two devisees shall take in moieties. And Mr. Hargrave says, that in some of the old books, it is said generally that there shall be a joint-tenancy; but according to the modern opinion, and it seems the best, there will be a joint-tenancy, or a tenancy in common, according to the words used in limiting the two estates, by which it is meant, that if the two estates given by the will have the unity or sameness of interest essential to a

(*a*) [Armstrong *v.* Eldridge, 3 Bro. C. C. 215.] (*b*) Doe *v.* Ironmonger, 3 East, 533.

joint-tenancy, the devisees shall be joint-tenants; but otherwise shall be tenants in common. (*a*)

12. Wherever a real estate is devised to two or more persons, and there are any words in the will indicating an intention that the devisees shall take several and distinct shares in it, they will be *tenants in common.*[1]

13. A person devised lands to his wife for life, remainder to A, B, and C, and their heirs *respectively* forever. The question was, whether A, B, and C, were joint tenants or tenants in common. (*b*)

The Court held, that here was a tenancy in common, and that it should go throughout, and was not to be divided; and the intent of the devisor appeared in the will, that every one should have his part, and their heirs: so here was a provision for children; and the word respectively would be idle, if another construction should be made, and would signify no more than what the law said without it.

14. One Lewen devised lands to his two sons, equally, and their heirs. It was adjudged, that the devisees took as tenants in common; for otherwise, the word "*equally*" would have no meaning. (*c*)

15. Lands were devised to five persons, their heirs and assigns, all of them to have *part and part alike*, and the one to have as much as the other. Adjudged, to be a tenancy in common. (*d*)

16. A person devised a messuage with the appurtenances unto M. G. and T. R., *equally* to them, his sister's sons. (*e*)

Lord Mansfield said, there was no room for argument;
337* "*equally*" *implied a division; whereas, if they were to take as joint-tenants, there would be no division.

(*a*) Ch. 9. 1 Inst. 112 b, n. 2 Atk. 373. 3 Atk. 493.
(*b*) Torret *v.* Frampton, Stiles, 434.
(*c*) Lewen *v.* Cox, Cro. Eliz. 695. 1 Vern. 32.
(*d*) Thorowgood *v.* Collins, Cro. Car. 75. Het. 29.
(*e*) Denn *v.* Gaskin, Cowp. 657. [Dougl. 760. Right *v.* Compton, 9 East, 276.]

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[1] In the United States, the general rule is, that all conveyances to two or more persons are tenancies in common, unless a different intention is expressed. See *ante*, tit. 18, ch. 1, § 2, note.

See, as to the rule in the text, Martin *v.* Smith, 5 Binn. 16; Westcot *v.* Cady, 5 Johns. Ch. 334; Evans *v.* Brittain, 3 S. & R. 135.

17. [So a devise to the testator's two daughters, *Jane* and *Mary*, of all his right in B. and C. *between them*, was held to constitute a tenancy in common.] (*a*)

18. The words "equally to be divided," have always been held to create a tenancy in common in a will, because they imply a division; whereas, between joint tenants, there is no division; unless there are other words in the will, as in some of the preceding cases, that expressly give a right of survivorship.[1]

19. A man devised to his wife for life, and after her decease, to his three daughters, *equally to be divided;* and if any of them die before the other, then *the survivors to be her heirs*, equally to be divided, and if they all died without issue, then over. (*b*)

It was held, that the daughters were not joint-tenants, but that they had several inheritances in tail, with cross remainders.

20. A man devised lands to his two sons and their heirs, and the longer liver of them, *equally to be divided* between them and their heirs, after the death of his wife. (*c*)

The Court was of opinion, that the sons were tenants in common, and that the devise was good; and the reason was upon the construction of wills, that it ought to be according to the intent of the devisor; his intent appearing to be, not only to provide for his two sons, but for their posterity; that not only his two sons, but their heirs, should have an equal part; for the words were, "equally to be divided between them and their heirs." And though, by the first words, it was given to them and the survivor of them, yet the last words explained what he intended by the word "survivor;" that the survivor should have an equal division with the heirs of him who should die first. And though the testator had not aptly expressed himself, yet upon all the words taken together, his meaning seemed to be so.

21. A person devised two leasehold houses to J. P. and J. H., and then said:—"My will and meaning is, that the rents of my two said houses shall be *equally shared and divided* between

(*a*) Lashbrooke *v.* Cock, 2 Mer. 70. See also Warner *v.* Hone, 1 Eq. Cas. Abr. 292, pl. 10.]
(*b*) King *v.* Rumball, Cro. Jac. 448. (*c*) Blissett *v.* Cranwell, 1 Salk. 226.

[1] [Davis *v.* Smith, 4 Harring. 68; Gilpin *v.* Hollingsworth, 3 Md. 190; Chighizola *v.* LeBaron, 21 Ala. 406.]

them the said J. P. and J. H. as aforesaid." It was held by Lord Hardwicke, that the devisees took as tenants in common. (*a*)

22. A person devised a freehold estate to trustees and their heirs, in trust, to permit his three sisters and their assigns
338 * to *hold and enjoy the said premises, and receive the rents thereof, to their sole and separate use; *and as his said sisters should severally die*, he gave the premises to their several heirs. (*b*)

Lord Hardwicke held, that the plain meaning of the words, "*as they severally die*," &c. was, that the sisters should take as tenants in common.

23. A testator devised all his real estate to trustees, as soon as his three daughters should attain their respective ages of twenty-one, *to convey to them* and the *heirs of their bodies, as joint-tenants.* (*c*)

Lord Hardwicke, after observing that, on account of the direction to convey, this was an executory trust, in which case the Court assumed greater latitude of moulding the will according to the intention of the testator, gave his opinion, that the daughters did not take as joint-tenants; but that conveyances should be made to them at twenty-one respectively, in tail male, with cross remainders in tail; by which means survivorship would be preserved, upon the death of any daughter without issue, which was the most that was meant by joint-tenants. (*d*)

24. J. S., seised in possession of some freehold lands, and entitled in reversion to others, made his will in these words,— "*Imprimis*, my mind and will is, that all my debts and funeral expenses be paid out of my whole estate; and whereas I am entitled to divers freehold messuages, lands, and tenements at the decease of my aunt M., I hereby give the said premises, as well as my other estate, to A, B, and C, and their heirs, upon trust that at the decease of my Aunt M. what my personal estate shall not extend to pay, they shall, by sale or mortgage of any part of my real estate, raise so much money as shall pay off all my just debts; and I hereby order, and my mind is, that the

(*a*) Prince *v.* Heylin, 1 Atk. 493. (Drayton *v.* Drayton, 1 Dessaus. 329.)
(*b*) Sheppard *v.* Gibbons, 2 Atk. 441.
(*c*) Maryat *v.* Townly, 1 Ves. 102.
(*d*) [Woodgate *v.* Unwin, 4 Sim. 129.]

remainder of my estate shall go to, and be *equally divided amongst*, my three children, Dinah, Frances, and Mary, and the survivor of them, and their heirs forever. And I do hereby order the guardianship of my son John, as well as of my other said three children, to my wife; and will that she shall educate them out of the rents and profits of their several estates and fortunes, given them, and settled upon them by this my will, or otherwise howsoever." (*a*)

Lord Hardwicke.—"In making a construction of this will, the testator's circumstances, as to family and estate, must be *considered. He had one son and three daughters; *339 he had two estates, one in possession, the other in reversion, and intended making a provision by way of portion for his three younger children. The question is, whether these three daughters take as joint-tenants, or tenants in common; and I am of opinion that they each take a separate share. Courts of law were anciently very favorable to joint tenancies, upon account of the tenures, to prevent the splitting them: but since the abolition of tenures, even courts of law have been less favorable to them; but courts of equity always espouse tenancies in common, as being a more equitable provision, and preventing the descent of, and right to, the estate depending upon an accident, that of survivorship, and are still more inclined to them, when the question arises upon provisions for children, whereby an equality is established amongst them. It was said on the one hand, that the word "*survivor*" makes a joint tenancy; and on the other that the words "*equally to be divided*," should sever it, and make a tenancy in common; and I am of opinion, that in this case these last words must prevail: for it could never be the testator's intent, that if any one of his younger children should die leaving children, such children should have nothing at all; but their mother's share should go to the surviving sisters. It was said the daughters might have severed the joint tenancy; but here they were under age; any one of them might have married, and had children, and died under age, before any severance of the joint tenancy could be.

"For the defendant, it was insisted, that the word '*survivor*' should relate to such as should be living at the death of M. his

(*a*) Stones *v.* Heartely, MSS. R. 1 Ves. 165.

aunt, because it was then the division must be made; but that would not do, for so the whole would be suspended, and nothing vest till M.'s death; which was plainly contrary to the testator's intention. The words carried an immediate devise, after the execution of the trust; he directs the rents and profits to be applied for their maintenance, until they attain twenty-one. And I, therefore, resort to the resolution in Blisset *v.* Cranwell, which I think fully governs the present case. It is there said, that the testator's intent of providing not only for his sons, but for their posterities, must prevail, and that therefore, the sons should be tenants in common: this is a good and substantial reason, and not a playing upon words. Apply it to the present case.

340* * This is a provision for children, as well as that; here are the words, "*equally to be divided*," as there were there, and the objection, that the survivor should take the whole, held in that case as well as in this. I take the word "*heirs*" here to relate to, and the inheritance to be thereby fixed in, them all, and not in the survivor. The taking it in the contrary sense would put the inheritance in abeyance upon the known difference between a gift to A and B and their heirs, which makes them joint tenants, and fixes the inheritance immediately, and a gift to A and B, and the heirs of the survivor, whereby no inheritance is fixed in either, but remains in abeyance until the death of one of them. (*a*)

25. A person devised lands to his five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint tenants. (*b*) †

(*a*) *Ante*, s. 20. (*b*) Rose *v.* Hill, 3 Burr. 1881. (Simpson *v.* Coon, 4 S. & R. 371.)

[† In devises and bequests of real as well as of personal estate to several persons as tenants in common, words of survivorship are frequently so blended with the words importing separate and distinct ownership among the devisees, that questions have arisen, as to what period those words refer, which indicate an intention that survivorship should take place among the devisees. In every case, of course, the presumed intention of the testator is the guide, so far as it can be collected; and we accordingly find some cases both of real and personal estate, where the words of survivorship have been referred to the death of the testator; that being the period of division or distribution; in which case the devisees or legatees have been considered tenants in common from that event, the benefit of survivorship continuing only during the testator's life. Bindon *v.* Suffolk, 1 P. Wms. 96; Barker *v.* Giles, 2 P. Wms. 280; Stringer *v.* Phil-

*341 * It was contended, that this was a tenancy in common among the five children for life; with a survivorship to the longer liver of them.

Lord Mansfield, said, that an estate to more than one, with a benefit of survivorship, was a joint tenancy. But here, the testator had expressly declared, that they should not take as joint tenants. The construction contended for was too refined for the testator's meaning. He meant to dispose of all his estate real and personal, and he meant to dispose of his real estate among his children, after the death of his wife. He used the same words in disposing of the real estate, as he did in disposing of the personal, and they explained each other. There were words in the will which plainly showed, that he meant his estate to go to the representatives of his children, after their deaths, though he had used improper terms. It was plain, that they were not to take as joint-tenants; and it was plain to him, that he considered that several of his five children might happen to die in his own lifetime, and therefore made a provision for such of them as should survive him, and be in existence at the time when the

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lips, 1 Eq. Ca. Ab. 292, pl. 11; Trotter *v.* Williams, Pre. Ch. 78; Smith *v.* Horlock, 7 Taunt. 129; King *v.* Taylor, 5 Ves. 806; and so in other cases where the period of distribution was *not* the death of the testator. Rose *v.* Hill, *ubi supra;* Wilson *v.* Bayly, 5 Bro. P. C. 388, (3 Toml. ed.) 195; Roebuck *v.* Dean, 2 Ves. 265; Perry *v.* Woods, 3 Ves. 205; Maberly *v.* Strode, 3 Ves. 450; Russell *v.* Long, 4 Ves. 551; Brown *v.* Biggs, 7 Ves. 279; Doe *v.* Prigg, 8 B. & Cress. 231, and the authorities there cited. Garland *v.* Thomas, 1 New Rep. 82; Edwards *v.* Symons, 6 Taunt. 213. In the following class the survivorship was confined to the death of the tenant for life. Daniell *v.* Daniell, 6 Ves. 297; Jenour *v.* Jenour, 10 Ves. 562; Newton *v.* Ayscough, 19 Ves. 534; Brown *v.* Kenyon, 3 Mad. 410; Cripps *v.* Wolcott, 4 Mad. 11; Pope *v.* Whitcomb, 3 Russ. 124; Crowder *v.* Stone, Ib. 217; Da Costa *v.* Keir, Ib. 360. In the following, the survivorship was referred to the minority of the devisees or legatees. Hawes *v.* Hawes, 1 Ves. 13; Mendes *v.* Mendes, 3 Atk. 619; Earl of Salisbury *v.* Lambe, Amb. 383; Halifax *v.* Wilson, 16 Ves. 168; Bayard *v.* Smith, 14 Ves. 470; Walker *v.* Main, 1 J. & Wal. 1; Crozier *v.* Fisher, 4 Russ. 398; (Woodgate *v.* Unwin, 4 Sim. 129.) In the following case the survivorship was extended to the dying of the legatee or devisee without leaving issue. Shergold *v.* Boone, 13 Ves. 370. In the cases of Armstrong *v.* Eldridge, 3 Bro. C. C. 214, (Belt's ed.); Turkerman *v.* Jeoffrys, Holt's Rep. 370, sup. s. 8, are to be found instances of the words of severance yielding to the general intention that the devisees should take as joint tenants. The later case of Jones *v.* Randall, 1 Jac. & Walk., so closely resembles that of Armstrong *v.* Eldridge, that it is not easy to reconcile them. In Jones *v.* Randall, the words of severance were held to govern the construction. The greater part of the above cases will be found arranged and discussed in 2 Rop. Leg. pp. 334 to 357, ed. 1828.]

interest was to vest, and their representatives. He meant to prevent a lapse, and therefore the Court might rather apply the words to a fixed particular time, than give no meaning at all to them; and this was agreeable to the case of Stringer *v.* Phillips. (*a*)

Mr. Just. Wilmot concurred; he thought the true construction to be, that the words "*survivors and survivor*" were inserted in order to prevent the consequence of any lapse, by any of the testator's children dying in his own lifetime. He meant his children to be all equal; and if one only or more should survive the rest, at the time of his death, the clause meant, that the share or shares of such survivor or survivors should go to them, and their representatives; but he could never mean to exclude the children of any of his children, who should leave any. This will gave the absolute fee to all, as tenants in common, for "*executors*" was equivalent to "*heirs*" in a will.

342* Mr. Just. Yates, who tried the cause, concurred; the testator's *intention being as plain as it could be, having said that his children should take as tenants in common, and not as joint-tenants; and the word survivor should not destroy and control this plain intention. (*b*)

The Court were unanimous that it was a tenancy in common in fee; and that the words "*survivors and survivor*" related to the death of the testator.

26. R. Clarke devised his estate to trustees and their heirs, to the use of the testator's nieces, Susan Clarke, Eliz. Garland, and Ann Corry, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors, as tenants in common and not as joint tenants; and for want of such issue remainder over. (*c*)

Upon a case sent by the Master of the Rolls for the opinion of the Court of Common Pleas, the Judges of that Court certified that the devisees took as tenants in common.

27. It has been stated that two persons may have an estate in joint tenancy, for their lives, and be tenants in common of the inheritance. These estates may be created by will, as well as by deed. (*d*)

(*a*) 1 Ab. Eq. 292.
(*b*) [Doe *v.* Prigg, 8 Bar. & Cres. 231.]
(*c*) Garland *v.* Thomas, 1 Bos. & Pul. N. R. 82.
(*d*) Tit. 18, c. 1. s. 8.

28. A person devised an estate to be sold for the payment of debts and legacies; and directed that the surplus of the money should be laid out in the purchase of lands, to be settled to the use of the testator's two nephews, and the survivor of them, and their heirs, *equally to be divided between them, share and share alike.* The question was, whether these words created a joint tenancy, or a tenancy in common. (*a*)

Lord King said, it was a certain rule, in the exposition of wills especially, that every word should have its effect, and not be rejected, if any construction could possibly be put upon it, and here he thought there might. The first part of the devise being to two, and the survivor of them, made them plainly joint-tenants for life, and therefore they should be so taken; and then, as to the next words—"*and to their heirs, equally to be divided between them, share and share alike,*" these were plainly words importing a tenancy in common, and should operate accordingly, so as to make them tenants in common of the inheritance; by which construction of the will every word would take place.[1]

* A decree was made accordingly; which was affirmed *343 by the House of Lords. (*b*)†

29. With respect to the words by which cross remainders are expressly created in a will, they are of course the same as those which are used for that purpose in a deed. But *cross remainders may arise in a will, by implication of law,* where it appears to have been the intention of the testator that there should be cross remainders. (*c*)[2]

30. A having issue five sons, his wife being *ensient* with the

(*a*) Barker *v.* Giles, 2 P. Wms. 280. Barker *v.* Smith, S. C. 9 Mod. 157. (Bunch *v.* Hurst, 3 Desau. 288. Westcott *v.* Cady, 5 Johns. Ch. 334. Stewart *v.* Garnett, 3 Sim. 399.)
(*b*) 3 Bro. Parl. Ca. 104. (*c*) Horne *v.* Barton, Coop. 257.

[† For the cases of bequests of personal estate to legatees as tenants in common, see 2 Roper's Leg. 329, 356, ed. 1828. See also Lushington *v.* Sewell, 1 Sim. 435, 475.]

[1] The words "*share and share alike,*" may be controlled by circumstances, showing that they were not intended to create a tenancy in common; Moore *v.* Cleghorn, 11 Jur. 598.

[2] As to the words, by which cross remainders are created in a deed, see *ante,* tit. 32, ch. 22, § 59, *et seq.*

In order to raise cross remainders by necessary implication, there must appear in

sixth, devised two-thirds of his lands to his four younger sons, and the child *in ventre matris*, if it was a son, and their heirs; and if they all died without issue male of their bodies, or any of them, that the land should revert to the right heirs of the devisor, (*a*)

It was adjudged, that the younger sons were tenants in tail, with cross remainders to each of them; for it was clearly the intention of the testator that no part of the estate devised should revert to the heirs of the devisor, as long as any issue remained of any of his younger sons.

31. A man having two sons, devised part of his lands to one of them and his heirs, and the remaining part to the other and his heirs; and added this item;—"I will that the survivor of them shall be heir to the other, if either of them die without issue." Adjudged, that they were tenants in common in tail with cross remainders. (*b*)

32. A testator devised in these words,—"I give all my lands in M. to my two daughters, Elizabeth and Ann, and their heirs, equally to be divided between them; and in case they happen to die without issue, then I give and devise all the said lands to my nephew." Adjudged, that the two daughters took estates tail, with cross remainders. (*c*)

33. [In the case of Green *v.* Stephens, the devise was to the first and other sons of the testator's nephew, John Stephens, in tail

(*a*) Clache's case, Dyer, 330, b. pl. 20.
(*b*) Chadock *v.* Cowley, Cro. Jac. 695,
(*c*) Holmes *v.* Meynel, T. Raym. 452. 2 Show. 135.

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the will an intention that no person shall inherit any part of the estate, or take it by way of remainder, so long as any of the devisees, or any of their issue, to whom it is given, are alive. If, therefore, an estate be devised to several persons and the heirs of their bodies, and if they all die without issue, remainder to A; it is apparent, that A cannot take, unless they all die without issue; and if one of them dies without issue, as A cannot take, it follows by necessary implication, that the others must. See Hungerford *v.* Anderson, 4 Day, 368, 372, per Reeve, C. J., Anon.; Dyer, 303 b, pl. 49. But if there be a devise to two, and upon the failure of issue of either of them, their several shares are limited over to several others, cross remainders will not be implied; for here is an intention that each limitation over shall take effect upon the decease of the devisee without issue. Baldrick *v.* White, 2 Bailey, 442. And see Simpson *v.* Coon, 4 S. & R. 368; Den *v.* Cook, 2 Halst. 41; Brooke *v.* Turner, 2 Bing. N. C. 422; Parker *v.* Parker, 5 Met. 134.

male, and in default of such issue, then to the daughter and * daughters of the said John Stephens, her and their * 344 heirs forever as tenants in common; and for want of such issue, then to the testator's three nieces and *their several and respective heirs* forever as tenants in common; and for want of such issue to the testator's right heirs. The testator then directed certain lands to be sold, and the residue of his personal estate to be converted into money, and the produce to be invested in the purchase of lands; and when purchased, he directed the lands should be settled to the uses, &c., as he had before settled his lands. The lands were not purchased, and the question was, whether the money belonged to the heir in tail of the surviving niece (the other two nieces having died without issue) or one third to him and the other two thirds to the devisee of the remainder man; this depended on the question, whether the testator's direction to lay out the personal estate in land should have been executed by raising cross remainders. Lord Eldon decided that it should: his Lordship observed, that conceiving the intention of the will to be for cross remainders among the daughters of the nephew, he could not think that the testator had not the same intention with regard to his nieces. There was nothing to distinguish them except the word *respective*, which, upon the authorities he had last mentioned, did not make a distinction upon which judicial construction should turn.] (*a*)[1]

(*a*) 12 Ves. 419. 17 Ib. 64. [Doe *v.* Jenkins 5 Bing. 469. Livesay *v.* Harding, 1 Russ. & Myl. 656.]

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[1] Where lands were devised to A, B, and C, and their lawful *issue* respectively, in tail general, with benefit of survivorship among the *issue* respectively, as tenants in common,—it was held that the devisees took life-estates, and their children contingent remainders in tail general, by purchase, in their respective parents' shares; with cross remainders in tail among A, B, and C; the testator having used the word "*issue*" as synonymous with "*sons and daughters.*" Cursham *v.* Newland, 2 Bing. N. C. 58; 2 Scott, 105. And see Walker *v.* Petchell, 1 M. G. & S. 652.

Devise to A, for life, remainder to trustees, to preserve, &c., remainder to all the children of A, as tenants in common; and for want of such issue, to B, for life, remainder in the same manner, to B's children; and for want of such issue to C, in fee. Held, that the children of A took estates for life with cross remainders between them for life; with remainder to B for life, remainder to his children, with cross remainders between them for life; remainder to C, in fee. Ashley *v.* Ashley, 6 Sim. 358.

C. G. devised thus:—"I give and bequeath to my wife Sarah, all my estate, real

34. The *implication must*, however, *be a necessary one;* for otherwise, cross remainders will not be raised, even between two persons, without words creating a necessary implication.

35. Richard Holden devised lands to his grandson Richard Holden, and granddaughter Ann Holden, equally to be divided, and to the heirs of their respective bodies; and for default of such issue, to another person. It was determined, that there were no cross remainders between Richard and Ann Holden, because there were no express words, nor any necessary implication to raise them; for the mere words "and for default of such issue," being relative to what went before, only meant, and for default of heirs of their respective bodies; and then it was no more than if it had been a devise of a moiety to Richard and the heirs of his body, and of the other moiety to Elizabeth and the heirs of her body, and for default of heirs of their respective bodies, remainder over, in which case there could be no doubt. (*a*)

345* *36. John Owen being seised in fee of two messuages, devised them to his wife for her life, and after her decease, to his son and daughter John and Margaret, to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue, to his wife in fee. Lord Hardwicke was of opinion, that this will was not so penned as to create cross remainders, which not being favored by the law, could only be raised by an implication absolutely necessary; and

(*a*) Comber *v.* Hill, 2 Stra. 969.

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and personal, during her life; the house and lot No. 37, situate in Mulberry street, to my heirs, Maria and Eliza G., in fee simple forever: *if one of them should die,* the property to descend on the other: *in case both should die,* the property to descend on my wife Sarah." Maria died in childhood. Eliza arrived at full age; married; and died intestate, and without having had issue. The mother survived both; married the defendant's father, by whom she had issue, the defendant and four others; and then died. Hereupon it was held, that by the words "*if one of them should die,*" &c. was meant *dying without issue;* and that upon the death of both daughters without issue, the whole estate became vested in the mother; it being a devise to the wife for life; remainder to the two daughters for life, with cross remainders in tail between them; remainder to the wife in fee; or if not cross remainders in tail, then by way of executory devise in fee, to the daughters and to the wife. Jackson *v.* Strang, 1 Hall, N. Y. S. C. Rep. 1. And see Jackson *v.* Anderson, 16 Johns. 383; Lion *v.* Burtis, 20 Johns. 483, as expounded in 1 Hall, 29, 30.

that was not the case here, for the words several and respective effectually disjoined the title. (*a*)

37. It *was*, however, laid down by the Judges, *in the reign of King Charles I.*, that *cross remainders should not be implied between more than two persons.* And the late Mr. Serjeant Williams has observed, that this doctrine was established for two reasons; one was, to prevent as well the confusion which it was said would follow from the division of an estate among many, as the uncertainty which would arise, whether the surviving shares should vest in them as joint tenants, or tenants in common, and for what estate. The other, which was a technical reason, was to avoid the splitting of tenures. (*b*)

38. A person having three sons, and being seised of three houses, devised a house to each son and his heirs; with a proviso, that if all his said children should die without issue of their bodies begotten, that then all his said messuages should remain over, and be to his wife and her heirs. (*c*)

It was adjudged, that these words did not create cross remainders between the sons; but that on the death of any one of them without issue, his house should go over to his mother. And Mr. Just. Doddridge said, that although in a devise to two persons, there might be cross remainders, by implication, yet that in a devise to three, cross remainders should never be implied, on account of the uncertainty and inconvenience.

39. In a subsequent case Lord Hale said, that cross remainders should not be created between three persons, unless the words of the will plainly proved the intent of the testator to have been so; as if Blackacre were devised to A, Whiteacre to B, and Greenacre to C, and if they should all die without issue of their bodies, *vel alterius eorum*, then cross remainders would be allowed. (*d*)

40. A person devised to his four sisters and a niece for their *lives, share and share alike, as tenants in common, *346 and not as joint tenants, remainder to their sons successively in tail male, remainder to daughters in tail, the reversion to his own right heirs. (*e*)

Lord Mansfield said, that wherever cross remainders were to

(*a*) Davenport *v.* Oldis, 1 Atk. 579 [See Green *v.* Stephens, *infra*. Doe *v.* Cooper, 1 East, 229.] (*b*) 1 Saunders, Rep. 185 a, n. 6. (*c*) Gilbert *v.* Witty, Cro. Jac. 655.
(*d*) Cole *v.* Levingstone, 1 Vent. 224. (*e*) Perry *v.* White, Cowp. 777.

be raised by implication between two, and no more, the presumption was in favor of cross remainders; where they were to be raised between more than two, there the presumption was against cross remainders; but that presumption might be answered by circumstances of plain and manifest intention either way. This was a qualification of the rule laid down in former cases; for they seemed to say that there should not be cross remainders between more than two; but the true rule was to take it with the qualification above stated. Here the presumption was against cross remainders, and judgment was given that there were no cross remainders.

41. In the case of Doe *v.* Cooper, which has been stated in a former chapter, Mr. Just. Lawrence observed, that the principal part of the plaintiff's argument was founded upon the raising of cross remainders, by implication, between the issue of Richard Cook. But it was a settled rule, that they should not be implied between more than two, unless such appeared upon the face of the will to have been the intention of the testator; but no such intent appeared in that case, from the words of the will; nor could it be implied merely from the circumstance that the remainder over was not to take effect but upon the dying of Richard Cook without leaving issue. (*a*)

42. *This doctrine has been somewhat altered in modern times;* for it has been lately held, that where there are no words to sever the title, cross remainders shall be implied; and that the *presumption against cross remainders*, between more than two persons, may be *answered by circumstances of plain intention.* (*b*)

43. A devise was in these words:—"To the use of all and every the daughter and daughters of the body of P. H., and to the heirs of her and their body and bodies lawfully issuing; such daughters, if more than one, to take as tenants in common, and not as joint tenants; and for default of such issue, to the right heirs of the devisor." (*c*)

There were two daughters; and one of them having died an infant, the question was, whether her sister became entitled * to her moiety. On a case being sent out of the Court of Chancery, for the opinion of the Judges of the Court of K. B., the certificate was:—"There are no words in

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(*a*) *Ante*, c. 12. (*b*) 1 Saund. 185 a, n. (*c*) Wright *v.* Holford, Cowp. 81.

the instrument which intimate any intention to limit over the respective shares of the two daughters dying without heirs of their bodies respectively; on the contrary, the limitation over is of the whole estate to all the daughters, and is to take place on the express contingency of failure of all and every the daughter and daughters, and the heirs of their body and bodies; and the limitation over on default of such issue, is to the heir at law. Consequently, we are of opinion, that as nothing is given to the heir at law, whilst any of the daughters or their issue continue, they must, among themselves, take cross remainders."

44. A person, after devising to his sons in succession for life, with remainder to the heirs male of their bodies, remainder to the heirs female of their bodies, devised to the use of all and every his daughter and daughters, as tenants in common, and not as joint-tenants, and to the heirs of her and their body and bodies issuing, with remainder to the heirs of his brother Abraham for ever. Lord Mansfield said, the question was, whether the intent was so plain as that it could not be effectuated without giving cross remainders; and the Court thought that it was plain and unavoidable to give cross remainders. The testator had three sons, to each of whom he gave several estates in tail. His plan was to follow the course of descent by preferring even the female line of each of his sons (in failure of the male) before his other sons and their male line, and before his own daughters. He thought the coming to his daughters a remote contingency, he therefore made use of the words, daughter and daughters; all and every; if two or more; supposing that the number might be reduced before they might become entitled. He took for granted that a remainder to his brother Abraham, who was alive when he made the will, could not take place till failure of his own issue; therefore he limited the remainder to the heirs of his brother Abraham, supposing it not likely to happen in his time. He also limited the remainder in the singular number; conceiving it could not take effect till the death of the last daughter, without issue. "We think these words are equivalent to an express declaration that there shall be cross remainders. In all the limitations the female line of each son must fail, before the male *line of the other sons shall take; and *348 all must fail before the daughters could take: then it would

be absurd to suppose that he meant to devise over the shares of any of his own daughters dying, from the rest, when he had not done so by his sons' daughters; or that he should have given to the heirs of his brother the share of one of his own daughters dying, while any of them was left: for if Abraham had no children, then the daughters would be his heirs. Therefore, we think he has given all his daughters the estate, with cross remainders, as fully as if he had given them in the most express words." (*a*)

45. G. Phipard devised an estate to his brothers William and John, and his sister Elizabeth, and the heirs of their bodies, as tenants in common, and not as joint-tenants; and for want of such issue, to his own right heirs forever. (*b*)

Upon a case sent out of Chancery, for the opinion of the Judges of the Court of K. B., whether there were cross remainders created by the will; Lord Mansfield said, the reason given in the old cases against raising cross remainders, namely, to prevent the splitting of freeholds, had not very great weight at the time it was given, and certainly had none then. To be sure, where they were to be raised between two, and no more, the favorable presumption was in support of cross remainders; where between more than two the presumption was against them; but the intention of the testator might defeat the presumption in either case. In Davenport *v.* Oldis, where the question was, whether cross remainders should be raised between two only, Lord Hardwicke, by way of general observation, laid it down that the words, in default of such issue, should not merely in themselves create cross remainders. But since that time, in the case of Wright *v.* Holford, the Court went expressly on the distinction of there being no words, such as respectively, to sever the title; but that the limitation over being, in default of all the issues, the rule of construction laid down, as between two, should prevail. That case, therefore, upon full consideration, says, that these words should lay such a foundation as to create cross remainders; and in general he believed that in devises of this kind the intention of the testator was in favor of cross remainders; but there must be some circumstances manifesting such intention. In the present case, the testator had

(*a*) Doe *v.* Burville, cited 2 East, R. 47. (*b*) Phipard *v.* Mansfield, Cowp. 797.

two brothers and a sister; if he meant his estate * should * 349
have gone to his heir at law, there was no occasion to make a will; therefore it was clear he did not mean his brother John should take it as his heir, or that William should do so; but he meant that his sister should be equally an object of his bounty. It was clear that he meant no division should take place, to create an inequality between them, till a failure of the heirs of all their bodies. He therefore began with a disposition thus,—"As to all my temporal estate, I give my lands to my two brothers and my sister, and to the heirs of their bodies lawfully begotten." These were the words of an ignorant man, and the will was inaccurately drawn, for there could not be a limitation to two brothers and a sister, and to the heirs of their three bodies; the Court therefore must mould them as near to the intent of the testator as they could. The lands, he said, were equally to be enjoyed by his brothers and sister, and the heirs of their bodies: it was impossible to have expressed his intention, that his sister should take equally with his brothers, more plainly. He meant his estate should continue fettered with an entail, as long as the existence of the persons then in being, and their issue; and that his heir at law should take nothing, till after that entail was determined: whereas if the construction were to be that the heir at law should take upon the failure of issue of any one, the elder or the younger brother, as the case might happen, would then take a fee in the share of the deceased brother or sister, and so create an inequality, which the testator never intended to make. For it was limited to them and the heirs of their bodies, and "for want of such issue;" "want of issue" there plainly meant issue of all of them; how could it then be executed but by raising cross remainders. It seemed to be as strong a case as that of Wright *v.* Holford. (*a*)

The other Judges concurred, and the Court certified that there were cross remainders.

46. A person devised to all and every the daughter and daughters of the body of his daughter Martha, and the heirs male of the body of such daughter or daughters, equally between them; if more than one, as tenants in common, and not as joint

(*a*) *Ante*, § 36. *Ante*, § 43.

tenants; and for and in default of such issue, he gave and devised all his said premises unto his right heirs forever. (*a*)

Upon a case sent out of Chancery, for the opinion of the Judges of the Court of K. B., Lord Kenyon said, that as between
350* *two only, it should be presumed that cross remainders were intended to be raised; but if there were more than two, it was necessary to resort to other words in the will to discover an intention to raise cross remainders: but here there was no doubt, from the words of the limitation over, but that the devisor intended to raise cross remainders between the granddaughters. The testator clearly intended that the whole should go together, whereas if no cross remainders were raised between the granddaughters, it would go to the right heirs by separate portions, on the death of each granddaughter.

Mr. Justice Buller said, this was a stronger case for raising cross remainders than that of Phipard *v.* Mansfield; for here, besides the words, for default of such issue, namely, issue of all of them, the devise over was of *all* the testator's estates; now they could not all go together but by making cross remainders between the granddaughters. (*b*)

The Court certified, that the daughters of Martha took estates in tail male, with cross remainders. (*c*)

47. It is observable, that the words *several and respective* were relied upon in the cases of Comber *v.* Hill, and Davenport *v.* Oldis, to show that the limitation over was to take place upon failure of either of the daughters and their issue respectively; but in the following case, cross remainders were raised by implication, notwithstanding the use of the word *respective*.

48. A person devised an estate to all and every the younger children of Mary Foxon, begotten or to be begotten; if more than one, equally to be divided among them, and to the heirs of their respective body and bodies, to hold as tenants in common, and not as joint-tenants; and if the said Mary Foxon should have only one child, then to such only child, and to the heirs of his or her body lawfully issuing; and for want of such issue, he gave and devised the said premises to C. N. (*d*)

(*a*) Atherton *v.* Pye, 4 Term R. 710.
(*b*) *Ante*, s. 45.
(*c*) Stanton *v.* Peck, 2 Cox, R. 8.
(*d*) Watson *v.* Foxon, 2 East, 36.

The question was, whether cross remainders were raised between the younger children of Mary Foxon.

Lord Kenyon said, that where cross remainders were to be raised by implication *between two, and no more*, the *presumption was in favor* of cross remainders, where they were to be raised *between more than two*, the *presumption was against them;* but that presumption might be answered by circumstances of plain and manifest intention, either way. Whatever was declaratory *of the intention of the party, he took to be *351 expressed; no technical words were necessary to convey an intention, but if taking the whole instrument together there was no doubt of the party's meaning, the Court arrived at the conclusion. Now here the testator set out with devising all his farm, &c., to his daughter and granddaughter for their lives, remainder after the death of the survivor, to all and every the younger children of Mary Foxon; if more than one, equally to be divided amongst them, and the heirs of their respective body and bodies, as tenants in common; and if only one child, then to such only child and the heirs of his or her body, &c.; and for want of such issue, he gave and devised the said premises to his son-in-law C. N. What he meant by the said premises was evident, and could not have been rendered clearer by saying *all* the said premises, though it might have served to multiply words. Then, after several limitations, and for want of such issue, he proceeded to divide the estate into thirds, to go to different persons; till then the entirety of the estate was to be preserved, and all was to go over at the same time. But great stress was laid upon the word *respective*, as disjointing the title; and the authority of Lord Hardwicke was referred to in the cases mentioned. No person regarded what fell from that great Judge with more reverence than he did; but it was unworthy of his great learning and ability to lay such stress, as he was stated to have done, on the word *respective*.† Creating a tenancy in common divided the title as much, whether the word "*respective*" was used or not;

[† Upon the effect of the word "*respective*," see Lord Eldon's opinion in Green *v.* Stephens, 17 Ves. 78, namely, that the cases which have founded themselves on the distinction of that word must now be considered as having been overruled; Lord Kenyon and Lord Mansfield, both dissenting from the case of Lord Hardwicke.]

and as to what might have been said by other Judges with reference to the opinion delivered in Comber *v.* Hill, and Davenport *v.* Oldis; in subsequent cases, where the word "*respective*" did not occur, feeling themselves right on the principle on which they proceeded, it was not to be wondered at that they were desirous of relieving their own minds from the weight of Lord Hardwicke's opinion, that there was a distinction between the cases, in the omission of that word, on which he so much relied; but it was too much to infer from thence that those Judges therefore approved of his opinion, or that their judgments
352 * were *governed solely by that consideration. In the case of Atherton *v.* Pye, the devise over, in default of such issue, was of *all* the testator's said lands; and stress was laid by some of the Judges on the word "*all*," in support of raising cross remainders between the issue; he would not say by implication, but by what the Judges collected to be the intention of the testator. But the word "*all*" was not decisive in that case, and in truth made no difference in the sense; for a devise over of the said premises, or the premises, or all the said premises, meant exactly the same thing. Admitting, therefore, the general rule, that the presumption was not in favor of raising cross remainders by implication between more than two, still that was upon the supposition that nothing appeared to the contrary, from the apparent intention of the testator. He had no doubt here but that the testator intended to give cross remainders among the issue of Mary Foxon. The devise over of the premises meant all the premises; he intended that all the estate should go over at the same time. He thought Lord Mansfield's quarrel with Davenport *v.* Oldis was well founded, and he agreed with the cases of Wright *v.* Holford, and Phipard *v.* Mansfield; and he could not distinguish the case from those. He was clearly of opinion, that the intention of the testator was the polar star by which the Court should be guided in the construction of wills, where no law was infringed: and here the intention was clear to give cross remainders. (*a*)

The other Judges concurred, and judgment was given accordingly.

49. A person devised her estate in remainder, after giving

(*a*) See 1 Taunt. 238. *Ante*, s. 46.

several preceding estates to her three daughters, Frances, Mary, and Arabella, and to the heirs of their bodies *respectively*, as tenants in common; and in default of such issue, she gave the same to her own right heirs forever. (*a*)

The Court of C. P. held, that cross remainders were created between the three daughters; and that wherever it appeared to be the intention of a testator, that the whole of his estate should go over together, upon the failure of issue of more than two tenants in common, cross remainders shall be employed between them in the mean time, in order to effectuate that intent. (*b*) [1]

(*a*) Doe *v.* Webb, 1 Taunt. 394.
(*b*) Roe *v.* Clayton, 6 East, 628. 1 Dow, 384. Cooper *v.* Jones, 3 B. & Ald. 425.

[1] A devise, "to my four sons, or the survivors of them, and their heirs and assigns, to be equally divided among them when the youngest attains the age of twenty-one years," was held not to raise cross remainders, but to vest an equal share in fee, in the sons living at the death of the testator. Lawrence *v.* M'Arter, 10 Ohio R. 37.

CHAP. XVI.

CONSTRUCTION—WHAT WORDS CREATE A CONDITION, MAKE LANDS LIABLE TO DEBTS, AND ENABLE PERSONS TO SELL LANDS.

SECT. 1. *What Words create a Condition.*
4. *Where construed a Limitation.*
7. *What Words make Lands liable to debts and Legacies.*
18. *The same Words extend to Copyholds.*
21. *Legacies not preferred to specific Devises.*
24. *What Words enable Persons to sell Lands.*

SECTION 1. WITH respect *to the words that are necessary to make a devise conditional*, it is laid down by Lord Coke, that many words in a will make a condition in law that make no condition in a deed; as a devise of lands to an executor *ad vendendum*. So if lands be devised to one *ad solvendum*, £20 to J. S., or paying £20 to J. S., this amounts to a condition. (*a*)

2. A person seised of lands, and having issue two daughters, devised to the eldest and her heirs, that she should pay to her youngest sister yearly £30. (*b*)

The question was, if this was a condition, and all the Justices held that it was; for so was the intent of the devisor: and otherwise the youngest sister had no remedy for the rent. Wray and Gawdy held, that if the words were, paying thirty pounds to her sister, this clearly was a condition; and so *ea intentione*, or *ad effectum;* and the testator's intent appearing, the law should so adjudge it; and the younger daughter might enter into the moiety.

3. It has been already observed, that even in a deed there were *no precise technical terms required* to make a condition precedent, or subsequent: a rule which may be applied more

(*a*) 1 Inst. 236 b.

(*b*) Crickmere *v.* Paterson, Cro. Eliz. 146.

generally and fully to the case of a will.[1] And it has been also *stated, in a preceding title, that in general, *adverbs* *354
of time are construed only to denote the period when an estate in remainder is to vest in interest, and do not create a condition precedent; and all the cases on this point will be found there. (*a*)[2]

4. In consequence of the doctrine, that no person but the heir can enter for a condition broken, it has long been established that a *devise to the heir at law* of the testator, upon a condition, shall be *construed a limitation.* (*b*)

5. A person devised his land to his *eldest* son, *paying to his daughter*, and to each of his other sons, 40*s.* within two years after his death. (*c*)

It was resolved, that though in a will the word "*paying*" would create a condition, yet in this case the law would construe it to create a *limitation;* for if it should be held a condition, then it would descend on the eldest son, and it would be at his pleasure whether his sister or brothers should be paid or not, and there-

(*a*) Tit. 32, c. 25. Tit. 16, c. 1. Doe *v.* Lea, 3 Term R. 41. (*b*) Tit. 16, c. 2.
(*c*) Wellock *v.* Hamond, Cro. Eliz. 204. 3 Rep. 20 b.

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[1] It is a well established rule of construction, that no form of words will create a condition precedent, if the intentions of the testator, as collected from every part of the will, clearly indicate a different purpose. Stark *v.* Smiley, 12 Shepl. 201; [Universalist Society, &c. *v.* Kimball, 34 Maine, (4 Red.) 424; Martin *v.* Ballou, 13 Barb. 119; Burnett *v.* Strong, 26 Miss. (4 Cush.) 116; Worman *v.* Teagarden, 2 Ohio, (N. S.) 380.] A devise upon condition that the devisee support and maintain a third person, is a devise upon condition subsequent. Ibid. Marwick *v.* Andrews, 12 Shepl. 525; Dunbar *v.* Dunbar, 3 Verm. 472; Holiday *v.* Summerville, 3 Pennsylv. R. 533. But see Wheeler *v.* Walker, 2 Conn. R. 196.

[2] A devise of a house, in case the devisee should choose to reside therein, becomes absolute by the devisee's intention to reside therein, though circumstances did not permit him to carry the intention into effect. Roe *v.* Down, 2 Chit. 529. But where there was a bequest over, in case the legatee, who was absent, should neglect to appear and claim it within the given time; it was held, that the legatee's ignorance of the testator's death did not save the condition, the claim not being made in fact within the limited time. Hawkes *v.* Baldwin, 9 Sim. 355; [Johnson *v.* Valentine, 4 Sandf. Sup. Ct. 36.]

On the distinction between conditions precedent and subsequent, see *ante*, tit. 13, ch. 1, § 6, and note.

As to conditions void or repugnant, see Ib. § 18, 20.

As to conditions in restraint of marriage, see Ib. § 53–66, and notes.

As to the performance and breach of conditions, see *ante*, tit. 13, ch. 2, § 2; 1 Jarm. on Wills, ch. 28, with Perkins's notes.

fore it must be considered the same as if the devise had been to the eldest son, till he made default in payment of the sums given to the sister and brothers.[1]

6. A person devised his estate to his *second* son in fee, *upon condition to pay* to his four daughters £20 each at their full age. This was held to be a *condition;* for it should be expounded according to the common law, where it was not necessary to expound it to the contrary. But where a devise was to an eldest son, upon such a condition, if it should be expounded to be a condition, it would be void, and to no purpose; for it would descend upon the eldest son, and no remedy could be had against him. (*a*)

7. By the common law, real estates were not subject to the payment of debts due on simple contract, unless made so by will; which was considered by many as a great defect, because credit is in fact given to the possessors of landed estates in proportion to the value of them. He therefore, who neglected to charge his real property with the payment of his debts, sinned, as it has been emphatically said, in his grave. And if he omitted this circumstance, on purpose to defeat the demands of his creditors, he died with a deliberate fraud in his heart. [The law, however, has been recently altered, by stat. 3 & 4 Will. IV. c. 104, as noticed in a former title.] (*b*)

8. These principles gave rise to a rule, both at law and
355 * in * equity, that whenever a testator expressed an intention that all his debts should be paid; or devised all his property, subject to the payment of his debts: his *real estate should be charged with the payment of his debts* by simple contract, if there was a deficiency in his personal estate. (*c*) [2]

(*a*) Curteis *v.* Wolverston, Cro. Jac. 56. (*b*) Tit. 1, ss. 55–57.
(*c*) See tit. 1, s. 54. Tit. 1, s. 59.

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[1] For the difference between conditions and limitations, see *ante*, tit. 13, ch. 2, § 64; Tit. 16, ch. 2, § 30.

[2] In all the United States, the rule of the common law, by which lands were not liable for the payment of debts, is changed; and the lands of a deceased debtor are generally liable for the payment of his debts, equally with the personal estate; though the usual course of administration is first to apply the personalty; and in some of the States, this course is imperatively required. See 4 Kent, Comm. 420–422; *Ante*, tit. 1, § 58, note. In the payment of debts, the assets in the hands of the executor or admin-

9. A person devised in these words,—"As to my temporal estate wherewith God has blessed me, I give and dispose thereof as followeth:—First I will that all my debts be justly paid, which I shall at my death owe, or stand indebted in, to any person or persons whatsoever. Also, I devise all the estate in G. to A. B." And this was all the estate the testator had. (*a*)

(*a*) Bowdler *v.* Smith, Prec. in Cha. 264. Tompkins *v.* Tompkins, Id. 398. S. P.

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istrator, are marshalled in equity as follows;—1. The general personal estate;—2. Estates devised specially for the payment of debts;—3. Estates descended;—4. Estates specifically devised, even though they are generally charged with the payment of debts. Donne *v.* Lewis, 2 Bro. Ch. Ca. 263, per Lord Thurlow. And see Davies *v.* Topp, 1 Bro. Ch. Ca. 526, 527, Perkins's ed. and cases there cited; Livingston *v.* Newkirk, 3 Johns. Ch. 322, 1 Story, Eq. Jur. § 577.

As to the words, by which a special charge on the lands is created, see Gardner *v.* Gardner, 3 Mason, 178; Morancey *v.* Quarles, 1 M'Lean, 194; Caldwell *v.* Kinkead, 1 B. Monr. Eq. 229; Sheldon *v.* Purple, 15 Pick. 528; Tower's case, 9 W. & S. 103; Fox *v.* Phelps, 17 Wend. 393; 20 Wend. 437, S. C.; Taft *v.* Morse, 4 Met. 523; Veazey *v.* Waterhouse, 10 N. Hamp. 409; Lupton *v.* Lupton, 2 Johns. Ch. 614; Bugbee *v.* Sargent, 10 Shepl. 269; 14 Shepl. 338, S. C.; [Lewis *v.* Darling, 16 How. U. S. 1; Tracy *v.* Tracy, 15 Barb. 503; Crabbe *v.* Moale, 4 Md. Ch. Decis. 219; Ib. 139; 3 Ib. 36.]

If the devisee is merely enjoined or directed to pay a sum of money to a third person, this alone will not create a condition. There must be language, showing an intention to make the devise depend upon the performance of the thing required; such as, a devise to one, "he paying" a certain sum; or the like. Fox *v.* Phelps, *supra*.

A charge in general terms, for the payment of *all* his debts, or, of all his *just* debts, does not authorize the payment of a *gaming* debt; Carter *v.* Cutting, 5 Munf. 223; nor, of any debt grounded upon an illegal consideration, nor of an undertaking without consideration, or *nudum pactum*. Chandler *v.* Hill, 2 Hen. & Munf. 124. Nor does it revive a debt already barred by the statute of limitations, or discharged by a certificate in bankruptcy or insolvency. Roosevelt *v.* Mark, 6 Johns. Ch. 266. But such a devise does extend to debts for which the testator was jointly bound, as the *surety* of another, as well as to his own debts. Berg *v.* Radcliff, 6 Johns. Ch. 302.

Where land was devised, charged with the payment of legacies, and afterwards the testator conveyed part of the same land to the devisee, by deed; and after the testator's death, the devisee received his share of the general residue of the estate, under a residuary devise, but refused to accept the land specifically devised to him; it was held, that he need not disclaim it by deed, and that he was not bound to pay the legacy. Ward *v.* Ward, 15 Pick. 511.

A testator devised certain equitable real estates to his executors, in trust for his wife and children, and bequeathed every thing else to his wife; and then said:—"My executors are charged with the payment of my just debts, of which I shall leave an account, in the letter to my wife." Hereupon it was held, that the testator's debts were charged on the real estate; and that the charge was general, and not restricted to the debts specified in the account. Dormay *v.* Borradaile, 10 Beav. 263.

The Court held, that this will created a charge on the real estate, for payment of debts.

10. A person being seised of a real estate, and also possessed of some personal estate, made his will in writing, and thereby devised in these words,—"*Imprimis*, I will and devise that all my debts, legacies, and funerals, shall be paid and satisfied in the first place." (*a*)

It was held, that this clause amounted to a charge on his real estate, for the payment of the debts and legacies.

11. A will began with these words:—"As to all my worldly estate, my debts being first satisfied, I devise the same as follows," &c. (*b*)

The Court held it clear in this case, that no land, nor any part of the testator's worldly estate, was devised, till after his debts paid; consequently, that the land was charged: and that it would have been sufficient though the word "*first*" had been omitted. (*c*)

12. A will began in these words:—"As to my worldly estate which it hath pleased God to bestow upon me, I give and dispose thereof in manner following, (that is to say,) *imprimis*, I will that all my debts, which I shall owe at the time of my decease, be discharged and paid." (*d*)

It was decreed by Lord King, that these words made the lands of the devisor liable to his debts. And this decree was affirmed in the House of Lords. †

(*a*) Trott *v.* Vernon, Prec. in Cha. 430.
(*b*) Beachcroft *v.* Beachcroft, 2 Verm. 690.
(*c*) Harris *v.* Ingledew, 3 P. Wms. 91, S. P.
(*d*) Legh *v.* Warrington, 1 Bro. Parl. Ca. 511. Hatton *v.* Nichol, Forest, 110. Williams *v.* Chitty, 3 Ves. 545. Shallcross *v.* Finden, Id. 738.

[† The preceding cases and those cited in the margin prove that general introductory or prefatory words, charging the testator's estate with the payment of debts, will be held sufficient indication of intention to charge the real estate in favor of *creditors*, and to the preceding the following cases may be added: Clifford *v.* Lewis, 6 Mad. 33, and the cases there cited; Ronalds *v.* Feltham, 1 T. & Russ. 418; Henvell *v.* Whitaker, 3 Russ. 343. But where the extent of the general expressions is qualified, as, "I direct all my just debts, &c., to be paid by my *executors*," and the real estate is specifically devised, the debts will not be charged. Davis *v.* Gardner, 2 P. Will. 187; Brydges *v.* Landon, stated 3 Vesey, 550; Keeling *v.* Brown, 5 Ib. 359; Powell *v.* Robins, 7 Ib. 209; Willan *v.* Lancaster, 3 Russ. 108. In Henvell *v.* Whitaker, *ubi supra*, the devisee of the real estate was the *executor*. In dubious cases equity will incline in favor of a

*13. A testator may charge a certain part only of his real property with the payment of his debts, and not the whole. *356

14. John Ivy, reciting that he had made a former will in the life of his wife, in which he had given her all his real and personal estate; that he had the misfortune to lose her, and therefore he made his will for the disposition of the same. First, he ordered all his debts and funeral charges to be honorably paid after his decease. In a subsequent clause, he devised particular premises, enumerating them, excepting H. and R.; all which enumerated lands, except H. and R., he devised to trustees, by and out of the money arising by sale, and out of the rents and profits thereof, in the mean time, in the first place, to pay and discharge all his debts, funeral expenses, and all legacies given by his will, or by other writing under his hand. He afterwards went on and said that H. and R. should be in the first place for payment of the legacies mentioned in his will. (*a*)

On a bill by the creditors to have the real estate by the will subjected to the payment of their debts, in aid of the personal, so far as that proved deficient, insisting that the whole real estate was by the will established as a fund for payment of debts, the question was, whether the whole or any part of the real estate was subject to debts.

Sir J. Strange, M. R., said, the word "*same*" must relate to the real and personal estate before given; and if it stood on that, and the word "*first*," only, he should have no doubt but that his whole real estate would be subject to the payment of debts; not from any express mention made that they should be a charge on his real estate, but from that construction the Court makes for the benefit of creditors; and that men should not sin in their graves. Here was no express declaration on the outset of the will that the testator's whole real estate should be charged with *payment of his debts; therefore it was necessary to look *357

(*a*) Thomas *v.* Britnell, 2 Vez. 313.

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charge for the benefit of creditors. 2 Ves. & Bea. 273; Kidney *v.* Coussmaker, 1 Ves. 436; 7 Bro. P. C. 573, 8vo. ed. S. C.; 2 Ves. 267. Upon the subject of charging debts and legacies on real estate by will, see 1 Rop. Leg. ch. xii. ss. 1 and 2, p. 573, &c. Ed. 1828.]

further into his will, and to see what was the intent of the testator, who was not bound in fact, though bound in honor, to make such a disposition for his creditors. Considering the whole, he had subjected the greatest, but not every part of his real estate, to the payment of his debts; having excepted a particular part, and applied it to another purpose, not intending that H. and R. should be liable to be swallowed up by creditors, to the prevention of the legatees under the will; but afterwards directed what should be done with H. and R. He had personal estate, which he could not exempt from payment of his debts; he had real, the whole of which he might subject; in declaring his intent as to that, he exempted H. and R. entirely, reserving them as a fund for legacies only. On the clauses therefore, altogether, and which were only clauses by which he expressly charged his land therewith, he considered how far his real estate should be chargeable to creditors; and then thought himself at liberty to apply the other part to satisfy legatees. Therefore, though on the first part, the Court might take the whole real to be charged with debts, yet as there was no express lien on the real, by these general words, and afterwards he distributed such part of his real for debts, and such for legacies, it was too much to lay hold on the general words, to say the whole should be charged with payment of debts. It could only be done by implication on the general words, which might be explained afterwards, and that implication destroyed: consequently, the plaintiffs could only have a decree for an account of the personal estate, and then the other parts of the real estate, except H. and R. for payment of their debts.

15. But unless the intention to exempt a particular part of the real estate be very clear, the whole will be subject.

16. T. Nichols by his will charged all his personal estate with debts and legacies; and so much as the personal estate should fall short to answer and pay, he charged all his messuages, lands, and grounds in Durham, with the payment of, in aid of the personal estate, and directed the personal to be sold. By a subsequent clause, he gave a particular farm to be sold, for payment of his debts and legacies; and by another clause, devised all his real estate so charged and chargeable to trustees, to receive and take the first two years' profits, that should arise and become

*payable out of his estate in Durham, for payment of his *358
debts and legacies, if the personal estate proved deficient. (*a*)

It was contended, that only that particular part, and the two years' profits, were charged; the generality of the first charge being controlled and restrained thereto by express words.

Lord Hardwicke said, that upon all the rules of charging for payment of debts and legacies, the charge of the personal estate therewith was unnecessary. Afterwards there was a full and complete charge on the real, of so much as the personal proved not sufficient to satisfy. It must be something very strong in the will to restrain that charge to a particular part, to go no further. If it rested on the clause which gave the farm, would the express direction of the will to sell a particular estate, towards payment of those debts and legacies that the personal was not sufficient for, afford a negative implication that no more should be sold? Certainly not. For there were several cases where there was a charge for payment of debts, and afterwards a direction that a particular part should be sold; that had been taken only to be a declaration that they should be first applied. Then the subsequent part was no more than what was done by the former clause, taking out a particular part; as one was of the inheritance, the other the profits. If indeed negative words were added, it could go no further; but he took those negative words, *and no more*, to be applied to the maintenance. There were several cases of a general charge, by words not nearly so strong as here, and a devise afterwards of a particular estate for that purpose, yet that was not sufficient to restrain it. This general charge then subsisted; and he could not make any other construction. (*b*)

17. A devise in trust for payment of debts does not revive a debt upon which the statute of limitations had taken effect, by the expiration of the time, before the testator's death. (*c*)

18. In all cases of this kind, customary or copyhold lands will be applied in payment of debts, as well as freeholds.

19. T. Penneck declared by his will that all his debts and funeral expenses should be first paid and satisfied. (*d*)

(*a*) Ellison *v.* Airey, 2 Vez. 568.

(*b*) *Vide* 1 Vez. 272. Foster *v.* Cook, 3 Bro. C. C. 350.

(*c*) Burke *v.* Jones, 2 Ves. & Bea. 275. (Roosevelt *v.* Mark, 6 Johns. Ch. 266. Smith *v.* Porter, 1 Binn. 209. Brown *v.* Griffith, 6 Munf. 450.)

(*d*) Godolphin *v.* Penneck, 2 Vez. 271. [Noel *v.* Weston, 2 Ves. & Bea. 269.]

The question was, whether certain customary lands held of the duchy of Cornwall, which had been mentioned in the will, in distinct parts from the rest of the fee simple lands, were subject to debts; the testator having surrendered those lands to
359* B. P., *who declared a trust thereof by deed, for several persons, and for the use of such as the testator should appoint.

Lord Hardwicke said, he was satisfied that by the will these lands were subject to debts.

20. A question arose, whether on failure of the personal estate, copyhold lands were liable to debts, under the common commencement of a will:—"As to all my worldly estate, I desire all my just debts should be first paid." (*a*)

Lord Commissioner Ashurst said, the doctrine was, that where the introductory words made the real estate liable, it should extend as well to the copyhold as to the freehold lands. The freehold was as unnatural a fund for the payment of debts as the copyhold. It was admitted, that if there had been no freehold, the copyhold would have been liable. If the freehold had been devised to one person, and the copyhold to another, the freehold might have been first applied. But he was clearly of opinion they were both liable.

Lord C. Hotham said, if the copyhold was charged by the will, there was nothing in the case to discharge it. The law followed the testator's intention, to apply the whole real estate to the payment of debts; which covered the copyhold as well as the freehold.†

21. It has been determined, that a clause in a will, *directing the payment of all the testator's debts and legacies*, is *not* alone sufficient to charge *legacies* on real estates *specifically* devised; for there the intention must be clearly expressed.[1]

(*a*) Coombes *v.* Gibson, 1 Bro. C. C. 273. [Kentish *v.* Kentish, 3 Ib. 257. Ronalds *v.* Feltham, 1 Tur. & Rus. 418.]

† [A devise of real estate in trust to pay debts takes it out of the operation of the 11 Geo. 4 and 1 Will. 4, c. 47, s. 9, which is nearly a reënactment of 3 Will. and Mary, c. 14, s. 4. Gott *v.* Atkinson, Willes, 521; although the trust be to pay simple contract in preference to specialty creditors. Miller *v.* Horton, Cooper, 45; but the devise must of course be effectual. Hughes *v.* Dillon, 2 Bro. C. C. 614; Bailey *v.* Ekins, 7 Ves. 318, 323. Vid. sup. Vol. I. p. 57, s. 54.]

[1] Real estate specifically devised, is not liable to contribute to the payment of legacies,

22. Thus, where a testator *first* directed that all his debts, legacies, and funeral expenses should be fully paid and discharged;

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on a deficiency of personal assets, unless it is specially charged by the testator. Hayes *v.* Seaver, 7 Greenl. 237; Humes *v.* Wood, 8 Pick. 478; Hubbell *v.* Hubbell, 9 Pick. 561. But a devise of all the residue of his estate, after paying the legacies and deducting the lands particularly devised, is not a specific devise, and is therefore liable for his debts and legacies. Hayes *v.* Jackson, 6 Mass. 149; Sutton *v.* Cole, 3 Pick. 232. So, where certain lands were specifically devised, and charged with certain specific burdens, and then the testator bequeathed certain pecuniary legacies, and then made his real and personal estates liable to the payment of the legacies; it was held, that the lands specifically devised were not liable to contribute to the payment of the pecuniary legacies. Spong *v.* Spong, 1 Dow & Cl. 365.

Where the will of the testator was thus: — "I give, bequeath, and devise to my wife the following pieces of land," (specifically describing them,) "also, all my personal estate, of every kind, wheresoever it may be found, which I am possessed of at the time of my decease, *after payment is made therefrom of my just debts*, funeral charges, and other necessary expenses; to have and to hold the same to her heirs, executors, administrators and assigns, to their use and behoof for ever; the other part of my real estate to be divided as the law directs;" — and his debts exceeded the value of the personal property; it was held, that the lands devised to the wife were not charged by the testator with the payment of his debts; and that, the personalty being exhausted, the undevised real estate should be next applied. Adams *v.* Brackett, 5 Met. 280.

The intention of the testator, to charge the real estate with the payment of legacies, must either be expressly declared, or fairly and satisfactorily inferred from the language and disposition of the will. It is not sufficient that debts or legacies are directed to be paid. That alone does not create the charge; but they must be directed to be *first* or *previously* paid, or the devise declared to be made *after* they are paid, or the like. Lupton *v.* Lupton, 2 Johns. Ch. 614. And see *supra*, § 9, 10, 11, 12.

If the devisee accepts the devise, he becomes personally liable for the legacies charged upon the land; the charge itself also still remaining. Birdsall *v.* Hewlett, 1 Paige, 33. And if the devisee dies before payment, the legatees have a specific lien on the income of the land, accruing after his death, as well as upon the land itself, in preference to his own creditors and legatees; and if this income and the land prove insufficient for payment of the legacies charged thereon, the balance, to the extent of the rents and profits received by the devisee in his lifetime, will constitute a debt against the residue of his estate. Hallett *v.* Hallett, 2 Paige, 15; [Spencer *v.* Spencer, 4 Md. Ch. Decis. 456.]

In the following cases, upon the language of particular wills, the real estate was held charged with the payment of legacies. Mandeville *v.* Roe, 1 Jon. & Lat. 371; Ashby *v.* Ashby, 14 Law Jour. N. S. 86; Evans *v.* Cochrane, 1 Coll. N. C. 428; Burrell *v.* Egremont, (Earl,) 7 Beav. 205; Roberts *v.* Roberts, 13 Sim. 336; Bateman *v.* Roden, (Earl,) 1 Jon. & Lat. 356; Cross *v.* Kennington, 15 Law Jour. N. S. 167; Shakles *v.* Richardson, 2 Coll. C. C. 31; [Pickering *v.* Pickering, 15 N. H. 281; Ellis *v.* Page, 7 Cush. 161; Buckley *v.* Buckley, 11 Barb. Sup. Ct. 43; Mitchell *v.* Mitchell, 3 Md. Ch. Decis. 31; Cornish *v.* Willson, 6 Gill, 299.]

The personalty was held liable, upon the language of the will, either primarily, or conjointly with the land, in Davies *v.* Ashford, 14 Law Jour. N. S. 473; 9 Jur. 612; Boughton *v.* Boughton, 1 H. L. Ca. 406; [Canfield *v.* Bostwick, 21 Conn. 550; Hull *v.* Hull, 3 Rich. Eq. 65; Marsh *v.* Marsh, 10 B. Mon. 360.]

and afterwards devised two freehold estates specifically to two persons, and gave some legacies; the question was, whether the legatees were entitled to have the devised estates sold for payment of their legacies. (*a*)

Sir R. P. Arden, M. R., said, it had been contended, that where a testator had charged his real estate by will, both debts
360 * and * legacies should take place of every other disposition. That the legacies should stand in the same place as debts, and that there was no reason why they should not have the same preference. The principle, however, was perfectly different, the one being purely voluntary, and the other obligatory. Whenever a man made a will, he was supposed to do that which conscience obliged him to do; and if he showed an intention that his debts should take place of every other disposition, and that he meant they should be paid, the Court would strictly enforce that intention. The same principle would not apply to legacies. The estate contended to be charged was specifically devised, and he could not see any reason why pecuniary legacies should have any preference to such specific devises. If he was to direct these legacies to be so raised and paid, it would be giving them that undue preference. (*b*)

23. [But it will not be inferred, that the testator intended to charge legacies upon his real estate, merely because he directs that his legacies shall be paid by his executor, to whom he devises the residue of his *real* estate, and to whom he bequeaths the residue of his personal estate, after payment of debts and funeral expenses.] (*c*)

(*a*) Kightley *v.* Kightley, 2 Vez. 328. (*b*) *Vide* 3 Vez. 551.
(*c*) [Parker *v.* Fearnley, 2 Sim. & Stu. 592.]

Where one devised all his real estate to his seven children, and bequeathed his personal estate to his three sons, charged with the payment of his debts; and the personal estate being insufficient to pay the debts, a portion of the real estate was sold for that purpose, by order of Court; it was held, that the devisees were entitled to reimbursement, out of assets subsequently discovered and received by the executors. Couch *v.* Delaplaine, 2 Comst. 397.

[Under a bequest by a testator to his wife of a certain sum, "to be taken out of such property as she shall think proper," real estate of the testator cannot be transferred to the wife, by her merely signifying her election to take it, although personal estate may be. Fisk *v.* Cushman, 6 Cush. 20. A will that makes no provision for the payment of legacies, is not on that account void. The law appropriates the personal property for that purpose. Martin *v.* Ballou, 13 Barb. 119.]

24. Littleton says (s. 169) where a person had a power, by the custom, of devising his lands, he might *devise that his executors might aliene and sell* them for a certain sum, to distribute for his soul. In this case, though the devisor died seised of the tenements, which descended to his heir, yet the executors might sell them, and put out the heir, and thereof make a feoffment alienation and estate by deed. And Lord Coke observes, that the feoffee shall be in by the devisor. (*a*) [1]

25. From this doctrine arose a custom for testators to direct that their executors should sell their lands, for payment of their debts; or to devise their lands to their executors for that purpose. In the latter case, the lands vest in the executors; but in the former, they have only a bare authority; and it being formerly held, that if one executor refused to join, the others could not sell, it was enacted, by the stat. 21 Hen. VIII. c. 4, that where lands were willed, to be sold by executors, though some of them refused, yet the rest might sell. And though the letter of the law extended only to cases where executors had power to sell, *yet, being a beneficial act, it was by construc- *361

(*a*) 1 Inst. 113 *a*.

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[1] Where the testator directed his executor to take possession of certain lands "and lease, or by any other means, out of the profits therefrom arising," to support his daughter during her life; it was held, that upon a deficiency of the rents and profits for the daughter's support, the executors had power to sell the land. Schermerhorne *v.* Schermerhorne, 6 Johns. Ch. 70. And see Allen *v.* Backhouse, 2 Ves. & B. 65, where the principal authorities are reviewed. See also 2 Jarm. on Wills, [534]—[542] by Perkins, and cases there cited. *Supra*, ch. 10, § 72, note.

Where the devise was to the widow for life, with power to sell so much of the land as might be sufficient to supply her necessities and make her comfortable; it was held that this power extended over all the lands devised; and that a sale of part in severalty, by the widow, was valid. Roberts *v.* Whiting, 16 Mass. 186. But where the income of lands was devised to the wife, "and if not sufficient to support her comfortably," then with power to sell any of his estate for that purpose; it was held, that the insufficiency of the income was a condition precedent to the right to sell; and that if the jury should find the income sufficient, the sale would be void. Minot *v.* Prescott, 14 Mass. 495, Suppl. And see Dike *v.* Ricks, Cro. Car. 335. [See also, Edmondson *v.* Nichols, 22 Penn. (10 Harris,) 74.]

The testator having directed that, after the death of his wife, his lands should be sold, and the proceeds divided among his children, but without saying by whom the sale should be made; it was held, that a sale by the survivor of two executors was valid. Lloyd *v.* Taylor, 2 Dall. 223.

tion extended to the case of lands devised to executors to be sold.[1] † (*a*)

26. It has been doubted whether a power of sale given to executors, be capable of survivorship or transmission. But Mr. Hargrave observes, that this question is now of little consequence; for such a power, though extinct at law, would certainly be enforced in equity; which rightly deeming the purpose for which the testator directs the money arising from the sale to be applied to be the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees, the case fell within the general rule of equity, that a trust shall never fail of execution for want of a trustee; and that if one is wanting, the Court will execute the office. (*b*)

27. It has been stated, that where a man devises his lands to his executors, for payment of his debts, and until his debts are paid; although the determination of such estates be uncertain, yet they are only chattel interests, transmissible to their executors. And it is now settled, that any words, from which it can be inferred to have been the intention of the testator that his lands shall be sold for payment of his debts, will operate as a power of sale. (*c*)

28. A person having surrendered his copyhold lands to the use of his will, devised in these words:—"My debts and legacies being first deducted, I devise all my estate real and personal to J. S." It was decreed by Lord Nottingham, that these words amounted to a devise to sell, for the payment of debts. (*d*)

29. The same point was determined in a subsequent case.

(*a*) Idem. Bonifaut *v.* Greenfield, Cro. Eliz. 80. (Davoue *v.* Fanning, 2 Johns. Ch. 252.) Fearne's Op. 222.

(*b*) 1 Inst. 113 a, n. 2. (Lloyd *v.* Taylor, 2 Dall. 223.) Tit. 12, c. 1.

(*c*) Tit. 8, c. 1, § 5. (*d*) Newman *v.* Johnson, 1 Vern. 45.

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[1] This statute has probably been generally adopted in the United States. See 4 Kent, Comm. 325. *Ante*, tit. 32, ch. 13, § 48, note.

Under a power to C and his executors to sell, it has been held, that a sale by the executor of C's executor would be valid, if the object, to be attained by the sale, still subsisted. Smith *v.* Folwell, 1 Binn. 546.

[† It is said by Littleton, s. 169, that in the case of an authority to sell, the executors may make a feoffment, alienation, and estate by deed, or without deed. The reason is, that the purchaser is in by the devisor; the executors having a mere right of nomination. *Vide* Vin. Ab. Tit. Authority, B.—*Note to former edition.*]

But this kind of power being a naked one,† and not coupled with an interest, the heir at law, or devisee, must, in general, join, in order to transfer the legal estate to the purchaser. (*a*)[1]

(*a*) Wareham *v.* Browne, 2 Vern. 154.

[† The joining of the heir, it is conceived, is a cautionary measure merely, and not necessary, where the power to sell is clearly in the executor; for such a power involves in it a power to convey to the purchaser, and to give receipts, as will be seen from the authorities cited below. Where the case is doubtful to whom the power of sale is given, of course the concurrence of the heir is proper. It is to be observed, that in Blatch *v.* Wilder, 1 Atk. 420, a case of copyhold, Lord Hardwicke decided that the power was in the executor, and he ordered the *heir to concur:* the reason of which is given by the reporter that, there being no devise to the trustees for sale, and the heir an infant, he had a day to show cause after he came of age; and the Lord Chancellor therefore directed the customary heir to join in the sale on attaining twenty-one, unless within six months after age he show cause to the contrary. In Bentham *v.* Wiltshire, 4 Mad. 44, Sir John Leach, V. C., decided that there was no power to sell either expressly or impliedly in the executors, as they had nothing to do with the produce of the sale, nor any power of distribution respecting it. A reference was made to the Master to settle a proper conveyance; he made the heir a party, to which exception was taken, but his Honor overruled the exception. In Sowarsbury *v.* Lacy, Ib. 142, there was an express power of sale in the executors; and a demurrer that they could not give receipts was overruled; but nothing was said about the conveyance. Patton *v.* Randall, 1 Jac. & W. 189, is an authority for the proposition, that a power of sale not expressly given to any one, is not to be implied to the executors, because the devisees of the estate are minors; and that, therefore, not having that power, the executors *could not convey.* In Tylden *v.* Hyde, 2 Sim. & S. 238, the testator directed his real and personal property to be converted into money, and the produce divided among his sisters. The executors contracted for the sale of the real estate, and the purchaser objecting to the title, upon a reference, the Master reported that the executors could by themselves *without the concurrence of any other party legally and effectually convey* to the purchaser. Upon exceptions to the Master's report, Sir John Leach, V. C., decided that as the produce of the sale was to be applied by the executors, there was an implied power of sale in them, and his Honor overruled the exception to the Master's report. In Breedon *v.* Breedon, 1 Russ. & Myl. 413, Sir John Leach, M. R., held that the devisees had an absolute power of sale, and therefore a power to give receipts, but his Honor did not decide whether they took the legal fee or only an estate for life, with the power of sale, nor was any mention made of their having a power to convey, which it is presumed, upon the preceding authorities, would be the necessary adjunct of their power of sale, if that were the construction of the devise.]

1 There is a marked distinction between naked powers, and powers coupled with an interest, in regard to the validity of their execution by the survivor of several executors or trustees. But the interest, on which the question turns, needs not to be beneficial to the party; it is sufficient if it be beneficial to a third person, in whose favor the power is held in trust to be executed, and who has a right, in equity, to compel the execution. The doctrine on this subject was much considered in the

362* *30. R. Bateman, by his will, taking notice that he had surrendered a copyhold estate to the use thereof, directed

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case of Peter *v.* Beverly, 10 Pet. 532, and was expounded by Thompson, J., in the following terms:—"The general principle of the common law, as laid down by Lord Coke, (Co. Lit. 112, b.) and sanctioned by many judicial decisions, is, that when the power given to several persons, is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest, it may be executed by the survivor. 14 Johns. Rep. 553; 2 Johns. Ch. 19.

"But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction, in a will, *to* the executors to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when any thing is directed to be done, in which third persons are interested, and who have a right to call on the executors to execute the power such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian, or other trustee, is invested with the rents and profits of land, for the sale or use of another; it is still an authority coupled with an interest, and survives. 1 Caines's Ca. in Er. 16; 2 Peere Wms.

"In the American cases, there seems to be less confusion and nicety on this point; and the courts have generally applied to the construction of such powers, the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will warranting the conclusion, that the testator intended, for safety or some other object, a joint execution of the power; as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power: and where there is a trust, charged upon the executors in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail for want of a trustee. This is the doctrine of Chancellor Kent, in the case of Franklin *v.* Osgood, 2 Johns. Ch. 19, and cases there cited; and is in accordance with numerous decisions in the English courts. 3 Atk. 714; 2 Peere Wms. 102. And is adopted and sanctioned by the court of errors in New York, on appeal, in the case of Franklin *v.* Osgood. And Mr. Justice Platt, in that case, refers to a class of cases in the English courts, where it is held, that although, from the terms made use of in creating the power, detached from other parts of the will, it might be considered a mere naked power to sell; yet, if, from its connection with other provisions in the will, it clearly appears to have been the intention of the testator, that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as

that the said copyhold should remain, one third to his wife for life, and the other two thirds to his son, paying to his two daughters £150 a piece at twenty-one; but by a latter clause in the will he said: "Provided, that if my personal estate and my house and lands at W. should not pay my debts, then my executors to raise the same out of my said copyhold premises." (*a*)

Lord Hardwicke said, the question was, whether the latter devise would entitle the executors to sell the copyhold estates; and he was of opinion it would: for as the rents were not near enough to discharge the testator's debts, these words would give the trustees a power to sell, to satisfy the testator's intention of paying his debts. It was therefore decreed, that the copyhold estate should be sold.

*31. In a subsequent case, where a testator had created *363

(*a*) Bateman *v.* Bateman, 1 Atk. 421.

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creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the Supreme Court of Pennsylvania, in the case of the lessee of Zebach *v.* Smith, 3 Binney, 69. The Court there considered it as a settled point, that if the authority to sell is given to executors, *virtute officii* a surviving executor may sell; and that the authority given by the will, in that case, to the executors to sell, was to them in their character of executors, and for the purpose of paying debts, an object which is highly favored in the law." 10 Pet. 564, 565. And see Taylor *v.* Benham, 5 How. S. C. Rep. 233, 272; Williams *v.* Peyton, 4 Wheat. 79; Jackson *v.* Ferris, 15 Johns. 345; Digges *v.* Jarman, 8 Har. & M'Hen. 468.

The neglect or refusal of one of the executors to execute the will, need not be in writing, nor of record, in order to enable the others legally to execute a power to sell; nor is it necessary that the recusant executor should have formally renounced or declined the administration, after a citation for that purpose; but it seems that the fact may be proved *aliundè*. Roseboom *v.* Mosher, 2 Denio, 61. And where the power to sell is given to the executors, provided, "in their opinion," it shall become necessary, for the payment of debts and legacies; the act of sale is, of itself, in the absence of fraud, conclusive evidence of their opinion. Ibid. And see Tyson *v.* Mickle, 2 Gill, 376.

If the power to sell is limited, to be executed within a certain time, the time will be computed from the actual sale, and not from the execution of the deed of conveyance. Harlan *v.* Brown, 2 Gill, 475. Where, by statute, after-acquired lands may be devised by general words, a power to sell them may be given, in like manner. Roney *v.* Stiltz, 5 Whart. 381. And see *supra*, ch. 3, § 32, note.

By a naked direction to executors, to sell lands, not coupled with any interest or trust, no title passes to them; but the estate descends to the heirs, subject to the power to sell. Thornton *v.* Gaillard, 3 Rich. 418; Haskell *v.* House, 3 Brev. 242; Baird *v.* Rowen, 1 A. K. Marsh. 214. But if in the will, containing such naked direction to executors to sell lands, no person be named as executor; an administrator with the will annexed has no authority to execute the power. Hall *v.* Irwin, 2 Gilm. 176.

a trust for payment of debts, Lord Hardwicke said, that the trustees might raise the money by mortgage or sale, without the assistance of the Court of Chancery; that it was common for trustees to do so, and that Court, if it came before them afterwards, had always supported it. (*a*)

32. G. Lancaster, being seised in fee of some lands, and possessed of others for a term of years, made his will; and after giving certain legacies proceeded thus:—"I do hereby charge and make chargeable all and every my lands and inheritance and leasehold, with the payment of my debts, funeral expenses, and legacies; and for more speedily raising money for payment of them, I devise to G., E., and D. Lancaster, (who were his two sons and daughter,) their heirs, executors, and administrators, the leasehold estate," (describing it,) for all the residue of the term, upon trust to sell the same, and to apply the money to the payment of his debts, &c. But in case the money arising from the sale of the leasehold estates should not be sufficient to pay and discharge all his debts; then he devised—"that his said two sons and daughter should and might absolutely sell, mortgage, or otherwise dispose of his freehold estate, for the payment of such of his said debts, &c., as his said leasehold estate should not be sufficient to discharge." And appointed his two sons and daughter executors. The leasehold estate was not sufficient to pay the testator's debts, legacies, and funeral expenses. (*b*)

Lord Keeper Henley directed a case to be sent for the opinion of the Judges of the Court of K. B., whether any estate passed to the two sons and daughter of the testator; or only a power to sell.

Lord Mansfield said, there were no words by which the estate was devised to the executors; therefore if it were construed that there was a devise to them, it must be raised by implication: but by the frame of the will it was plain that the testator did not so intend; for he showed, by the expression he had used, that he knew the distinction between the devise of an estate to them, and giving them only a power to sell; as to the term "*devise*," the expression, I devise, was here synonymous to saying, *I will*, or *my mind is*.

(*a*) Bath *v.* Bradford, 2 Vez. 587.

(*b*) Lancaster *v.* Thornton, 2 Burr. 1027.

The intention of the testator (it was said) could not be complied *with in this case, without an implication of a *364 devise to the executors; because it must otherwise descend to the heir at law, in the mean time, who would not be chargeable with the intermediate rents and profits, but altogether unaccountable for them; that clearly was not so. The land could only descend to the heir, subject to the charges, and would be liable in his hands to the payment of debts, legacies, and funeral expenses. So that the testator's intention was equally answered one way as the other.

The certificate was as follows—"Having heard counsel on both sides, and considered this case, we are of opinion, that no estate passed to the said Edmund, George, and Dorothy Lancaster; but only a power to sell, demise, mortgage, or otherwise dispose of the premises."

33. It was held by the Court of K. B., in a modern case, that where one devised lands to five persons in trust to sell, and to apply the money to certain uses, and afterwards made the same persons executors; they did not take the lands as executors; but as devisees in trust. (*a*)

34. Where powers of this kind are given to strangers they cannot be extinguished, either by the persons to whom they are given, or by those who are in possession of the land. (*b*)

35. It has been stated in a former chapter, that devises of land are fraudulent as against creditors. But devises for payment of debts are notwithstanding valid.

36. The cases in which purchasers from devisees or executors are bound to see to the application of the purchase-money, have been already stated. (*c*)

37. A will directing estates to be settled in strict settlement, and being silent about powers, does not authorize the insertion of a power of sale in a settlement. And a will directing proper powers for making leases, and otherwise, according to circumstances for the tenants for life, to be exercised by them when qualified, does not authorize the insertion of a power of sale

(*a*) Denne dem. Bowyer *v.* Judge, 11 East, 288. (Inman *v.* Jackson, 4 Greenl. 237.)
(*b*) 1 Inst. 237, *a.* 265, b. Willis *v.* Shorral, Tit. 35, c. 10. *Ante*, c. 1.
(*c*) Tit. 12, c. 4.

and exchange to be exercised with the consent of the tenant for life. (*a*)

38. [But in a modern case, where money was settled, with a power to the trustees to change the stocks, funds, and securities, in which it might be invested "for others of the same or the like nature, as often as it should be thought expedient," 365* and the *intended husband covenanted to settle any real estate to which he or his wife might become entitled in her right, upon the same trusts, and subject to the same powers, &c., as were therein before declared of the funds, or as near thereto as the nature of real estate would admit of, it was holden, that the settlement ought to contain powers of *sale and exchange;* and a distinction was taken, between a covenant to settle a particular estate, and a covenant to settle all estates generally.] (*b*)

(*a*) Wheate *v.* Hall, 17 Vez. 80. Brewster *v.* Angell, 1 Jac. & Walk. 625. [Horne *v.* Barton, 1 Jacob's Rep. 437.]

(*b*) [Williams *v.* Carter, Sugd. Pow. No. 7, Appendix.] Jacob, 440.

CHAP. XVII.

EXECUTORY DEVISES—DEVISE OVER AFTER A DEVISE IN FEE SIMPLE.

SECT. 1. *Origin of Executory Devises.*
2. *Devise over after a Devise in Fee.*
9. *Though the first Estate be not vested.*
11. *No Devise is Executory which can be supported as a Remainder.*
14. *An Executory Devise cannot be barred.*
SECT. 17. *Within what time an Executory Devise must vest.*
23. *A Devise over after a general Failure of Heirs or Issue is too remote.*
24. *Unless restrained to the Period allowed.*
27. *Curtesy attaches on the first Estate.*

SECTION 1. IT has been stated that, by the rules of the common law, no remainder could be limited over after a limitation in fee simple; nor a freehold created to commence *in futuro*. But the indulgence shown to testators in effectuating their intentions, however untechnically expressed, induced the Judges to dispense with these rules, in cases of wills, as well as in limitations of uses; and also to allow similar dispositions of terms for years, in wills, and in deeds declaring the trusts of such terms. (*a*)

2. Dispositions of this nature are called *executory devises;*[1]

(*a*) Tit. 16, c. 5,

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[1] The doctrine of executory devises received a full discussion in Nightingale *v.* Burrell, 15 Pick. 104, and was thus expounded in the luminous judgment, delivered by Ch. Just. Shaw:—"The essential difference in the quality of the estate, between a remainder and an executory devise, is, that the former may be barred at the pleasure of the tenant in tail, by a common recovery, or, in our State, by a conveyance by deed; but he who holds by force of an executory devise, has an estate above and beyond the power and control of the first taker, who cannot alienate or change it, or prevent its taking effect, according to the terms of the will, upon the happening of the contingency, upon which it is limited. It does not depend upon the particular estate, but operates by way of determination of the first estate limited, and the substitution of another in its place.

"As an executory devise was allowed only to give effect to the intent of a tes-

and are of three sorts. The *first* † is where the devisor disposes of the whole fee, but qualifies that disposition, and declares that

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tator, when such intent would otherwise have wholly failed, as not being conformable to the rules of the common law in regard to the transmission of real property, it has been adopted as a fixed and settled rule, that whenever a future interest in lands is so devised, that conformably to the rules of law, it can take effect as a remainder, it shall be construed to be a remainder, and not an executory devise. Purefoy *v.* Rogers, 2 Saund. 388. And in Doe *v.* Morgan, 3 T. R. 765, it is said by Lord Kenyon, that if ever there existed a rule respecting executory devises, which has uniformly prevailed without any exception to the contrary, it is that which is laid down by Lord Hale, in Purefoy *v.* Rogers, that 'where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise.'

"Another settled rule in regard to an executory devise, to prevent this mode of devising from being resorted to as a means of creating a perpetuity, is, that it must vest within the compass of a life or lives in being, at the time the devise takes effect, that is, at the death of the testator, and twenty-one years and the fraction of a year after, otherwise such executory devise is wholly void.

"And in the application of this rule, regard is had, not to any event which has taken place after the death of the testator, but the question is, whether by possibility the estate is so limited upon a contingency, that it may remain more than the allowed period, before the contingent interest will become vested, and if it can, it is not a good executory devise.

"There are two kinds of executory devise; one, where an estate is devised to one, but upon some future event that estate is determined, and the estate thereupon is to go to another; the other, when the estate is limited to commence *in futuro*, contrary to the rules of the common law. In the latter case, the fee in the mean time remains in the heir of the devisor.

"In determining, therefore, with a steady reference to these rules, whether a contingent interest given by will, is in legal contemplation an executory devise, or a remainder, the first consideration is, whether the estate, after which it is limited, is an estate in fee or in tail.

"If the estate after which it is to take effect, is an estate tail, upon which the contingent is dependent, there are two grounds, upon which, in most, if not in all cases, it may be concluded, that the limitation does not constitute an executory devise.

1. That the contingent interest thus given, after the devise of an estate tail, can in most instances take effect as a remainder, and so may become barred by a common recovery suffered by the tenant in tail.

2. Because if the devise is made to depend upon the determination of a previous estate tail, such particular estate may last as long as there remain any issue in tail, that is, to an indefinite and unlimited period, and so the contingent estate might not vest within the time required for the vesting of an executory devise, and therefore it cannot take effect as such.

"To determine whether any particular devise constitutes an estate in fee or an

[† Treated of in the present chapter; the second sort in Chapter XVIII.; the third in Chapter XIX. *infra.*]

in the event of some future contingency, the estate so devised shall go over to some other person. (*a*)

(*a*) Anon. Dyer, 127 a. in marg.

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estate tail, considered by itself, is usually not very difficult. It depends upon certain rules of construction, applied to particular forms of words, which are in a good degree settled. But it is a well-known rule of construction, that every clause and word in a will are to be taken together, however detached from each other, to ascertain the intent of the testator. When, therefore, by one clause in a will, an estate for life or an estate in fee is given by plain words, if it appear in other parts of the will, by explanatory words or by implication, that it was the intent of the testator, in such devise, that the issue of the devisee should take the estate in succession after him, then the life-estate is enlarged in the one case, and the estate in fee is reduced in the other, to an estate tail.

"If, therefore, an estate is devised to A and his heirs, which is a fee; and it is afterwards provided, that if A die without issue, then over, this reduces it to an estate tail by implication. The law implies that by "heirs" in the first devise, was intended heirs of the body, and it also implies from the proviso, that it was not the intent of the testator, to give the estate over, and away from the issue of the first devisee, but on the contrary, that such issue should take after the first devisee.

"The difficulty, therefore, in determining, whether a contingent devise is an executory devise or a remainder, usually arises where there is a plain devise in fee in one clause, and afterwards, a gift over upon the contingency of the first devisee dying without issue. If the implication from such description of the contingency taken together is, that in the event described it was the intention and expectation of the testator, that the issue should take in succession, then the fee first created is reduced to an estate tail, the tenant in tail may suffer a recovery and bar all remainders, and the gift over cannot take effect as an executory devise, both because it may take effect as a contingent remainder, and because it might not vest within the time limited for the vesting of the estate under an executory devise. But if properly described, the event of a person's dying without leaving issue surviving or not, is a contingency, upon which an executory devise may be limited over, as well as the happening of any other event. And there may be very good reasons why a testator should select this event, as one, upon the happening of which, or not, the estate should remain absolute in the first devisee, or go over to some secondary object of the testator's bounty. He may properly consider, that if the devisee, a son for instance, the first object of his bounty, has children, who survive him, he shall have the estate absolutely, to enable him to provide for such children, but leaving it to his discretion, whether he will transmit the estate to them, or make any other disposition of it, as he, such first devisee, may determine. But if such first devisee should leave no children to be provided for, the testator might well determine to adopt his own mode of disposing of the estate, and direct it in that event to vest in some other person. If, therefore, the description of this contingency is such, as not to raise any implication, that it is the intent of the testator that the issue are to take the estate as children and heirs of the parent, then the estate limited over is a good executory devise; the first devisee has an estate in fee, determinable upon the happening of the contingency, but otherwise absolute.

"In the former case, taking the first devise in fee, with the subsequent words 'if he die without issue,' as raising a necessary implication, that it was the intention of the testator to give the estate to the first devisee and his issue, it is a tenancy in

3. A testator devised to his mother for life, and after her death to his brother in fee; provided that if his wife, 367 * who was *then *ensient*, was delivered of a son, then the land should remain to him in fee. A son was born; and it was held that the fee of the brother should cease, and vest in the son, by way of executory devise.[1]

4. A person devised to A and his heirs; provided that if he died within age, then the land should remain to B and his heirs. Adjudged good. For when the devisee only takes *a limited estate*,[2] a contingent fee may depend upon it; but that was not

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tail, to which the law annexes certain incidents, among which the most important is, that the tenant in tail may suffer a common recovery; in the other, the law implies, that notwithstanding the first devise in fee, and the subsequent limitation over, upon the contingency of the devisee's dying without issue, there was no implication that if there were issue, they were to take the estate by force of the devise; then the original estate in fee, created by the first clause, is not reduced to an estate in fee tail, but the first devisee always continues to hold as tenant in fee, an estate in fee simple, determinable and defeasible, upon the happening of the event of his dying without actually leaving children surviving him; but otherwise absolute and indefeasible, so that he has the absolute disposal of it either by will or otherwise. During his lifetime, therefore, he cannot suffer a common recovery, but he may alienate the estate, subject only to the condition of not dying without leaving issue surviving him." See 15 Pick. 110–114. And see Spence on Equit. Jur. Vol. I., p. 470, 471; 4 Kent, Comm. 268–287; 1 Jarm. on Wills, ch. 27, Perkins's notes; [See also Abbott *v.* The Essex Co. 18 How. U. S. 202; Johnson *v.* Valentine, 4 Sandf. Sup. Ct. 36. The following clause in a will, namely: "I give to my two sons, viz.: John and Jacob, all my lands, &c., live stock, &c., tools, &c., bonds, &c., to be equally divided between them; and the executor is ordered to pay debts out of that part of the estate. *Item*, it is my will that if either of my said sons, John and Jacob, should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs," gave an estate in fee simple to John and Jacob; and the share of the one who first died without issue, passed over to the other son by way of executory devise. Abbott *v.* Essex Co. (ut supra.) A testator devised certain lands to J. D., in fee, and provided in the will that, if J. D. should not marry and have lawful issue, after his death the real estate so devised should go to J. S. and E., their heirs and assigns forever. J. D. died without issue, and it was held that the limitation over to J. S. &c., was not a contingent remainder, but was valid as an executory devise. Downing *v.* Wherrin, 19 N. H. 9.]

[1] A testator devised his estate to his wife for life, remainder to his child or children in fee; and if no child should live to be twenty-one years of age, then over, to the children of S. and W. A posthumous and only child was born, survived the widow, and died within age. Hereupon it was held, that the devise to the children of S. and W. was an executory devise, and not a contingent remainder; and that the children of W., born after the death of the posthumous child, would be entitled to take. Wells *v.* Ritter, 3 Whart. 208.

[2] It is essential to a valid executory devise, that the first devisee should take only a limited estate, without the absolute power of disposal. Wherever, therefor, it is

by way of remainder, but executory devise. And this doctrine was fully established in the following case. (*a*)

5. W. Brown devised lands to Thomas Brown his second son, and his heirs forever; and if Thomas died without issue, living William his brother, that then William his brother should have those lands to him and his heirs and assigns forever. (*b*)

All the Judges agreed, that this was a good limitation of the fee to William, upon that contingency; not by way of immediate remainder, for they all agreed that it could not be by remainder. As if one devised lands to A and his heirs, and if he died without heir, that it should remain to another, it was void and repugnant to the estate; for one fee could not be in remainder after another; for the law doth not expect the determination of a fee by the tenant's dying without heirs, and therefore cannot appoint a remainder to begin upon the determination thereof; but by way of contingency or of executory devise to another, to determine the one estate, and limit it to another, upon an act to be performed; or in failure of performance thereof, &c. For the one might be, and had always been allowed.[1]

6. A having two sons, B and C, by several venters, and being seised of Blackacre and Whiteacre, devised Blackacre in fee to B, and Whiteacre to C in fee; with a proviso, that if it should please God either of his said sons to die before such time as they should be married, or before they should attain to their age of twenty-one years, and without issue of their bodies to be begotten, then he gave all the said lands, which he had given by his will

(*a*) Hoe *v.* Gerils, Palm. 136. (Barnitz *v.* Casey, 7 Cranch, 456. Sayward *v.* Sayward, 7 Greenl. 210. Jackson *v.* Blanshan, 3 Johns. 292. Ackless *v.* Seekright, Breese, 46.

(*b*) Pells *v.* Brown, Cro. Jac. 590. (Richardson *v.* Noyes, 2 Mass. 56. Southerland *v.* Cox, 3 Dev. 394. Pendleton *v.* Pendleton, 2 Murph. 82. Langley *v.* Heald, 7 W. & S. 96. Robinson *v.* Adams, 4 Dall. xii. Fosdick *v.* Cornell, 1 Johns. 439. Anderson *v.* Jackson, 16 Johns. 382.)

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the clear intention, that the first taker shall have an absolute property in the estate devised, any limitation over, by way of executory devise, is void. Thus, where one devised his estate to his son and the heirs of his body; and if he should die leaving no heirs of his body, then he devised over *so much of his estate as his son should die possessed of;* the devise over was held void, because the son had power to spend the whole. Atto.-Gen. *v.* Hall, Fitzg. 114. And see, acc. Ide *v.* Ide, 5 Mass. 500; Jackson *v.* Bull, 10 Johns. 19; Flanders *v.* Clark, 1 Vez. 9; Jackson *v.* Robins, 16 Johns. 537; Couch *v.* Gorham, 1 Conn. 36.

[1] See the observations of Chancellor Kent upon this case in 16 Johns. 408.

unto such of his sons as should so decease before his marriage, or before his age of twenty-one, and without issue of his body, unto the survivor of his sons. The devise over was held good, as an executory devise. (*a*)

7. A person devised to his son William Heath, all his estate, till Edward Heath should attain his age of twenty-two
368* years, *and no longer. He afterwards said,—"*Item*, I give and bequeath to Edward Heath all my messuages in H. and C. for ever, that is, if he have a son or sons who shall attain twenty-one. But if my kinsman Edward Heath should chance to die without son or sons to inherit, my will is that the son of my son William Heath shall inherit." (*b*)

It was determined by Lord Thurlow, that Edward Heath took an estate in fee, subject to an executory devise over, in the event of his dying without issue, or of his issue dying under the age of twenty-one years.

8. A person devised a copyhold estate to his daughter Susan Saunders, and her heirs and assigns for ever; but if his said daughter should happen to die, leaving no child or children, or lawful issue of the body, living at the time of her death, then he gave, devised, and bequeathed all the said copyhold premises to T. B. and his heirs. (*c*)

Lord Eldon and the other Judges of the Court of Common Pleas held, that the whole fee being given to Susan Saunders, her heirs and assigns, no further remainder over could be limited upon that fee; and therefore the estate given to T. B. was a new fee limited upon the contingency, that is, an executory devise. (*d*)

9. Where there is a devise over, after a devise in fee simple, though such an *antecedent devise in fee be not vested*, but contingent, yet if the ulterior devise is limited so as to take effect in defeasance of the estate first devised, on an event subsequent to its becoming vested, it will be deemed an executory devise.

10. A person devised lands to his wife for life, and after her death, to such child as she was then supposed to be *ensient*

(*a*) Hanbury *v.* Cockerell, 1 Roll. Ab. 835. Right *v.* Day, 16 East, 67. Goodtitle *v.* Wood, Willes R. 211. (Holmes *v.* Holmes, 5 Binn. 252.)

(*b*) Heath *v.* Heath, 1 Bro. C. C. 147. (*c*) Doe *v.* Wetton, 2 Bos. & Pul. 324.

(*d*) Doe *v.* Rawding, 2 Barn. & Ald. 441. Right *v.* Day, 16 East, 67. Doe *v.* Frost, 3 Barn. & Ald. 546.

with, and to the heirs of such child forever; provided, that if such child as should happen to be born should die before the age of twenty-one years, leaving no issue of its body, the reversion should go to another. (*a*)

Lord Ch. J. Lee delivered the opinion of the Court, that the true construction of the will was, that there was a good devise to the wife for life, with a contingent remainder to the child in fee; and a devise over, which was good as an executory devise; and if the contingency of a child never happened, then the last devise was to take effect, upon the death of the wife.[1]

*11. An executory devise being a disposition contrary *369 to the rules established for the construction of conveyances at common law, whenever a future interest in land is *so devised as to fall within the rules laid down for the limitation of contingent remainders*, such devise will be construed as a contingent remainder, *not as an executory devise.*[2]

12. Thus wherever an estate is devised to a person and his heirs, with a limitation over in default of issue, it is construed to be an estate tail; and the limitation over is a remainder, to take effect on the determination of the estate tail. But, if the limitation over be directed to take place on an event which may happen during the continuance of the estate tail, it is an executory

(*a*) Gulliver *v.* Wickett, 1 Wils. R. 105.

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[1] A devise to such one of the testator's nephews abroad, as may first come to this country within six years after they hear of his death, is a good executory devise; and there being no intermediate disposition of the estate, it descends to the heirs at law. Chambers *v.* Wilson, 2 Watts, 495.

[2] This rule, laid down by Ld. Hale, in Purefoy *v.* Rogers, 2 Saund. 388, has been uniformly adhered to ever since. The student will find the law of executory devises most clearly stated by Serjeant Williams, in his note (9) to that case.

See also Terry *v.* Briggs, 12 Met. 17, 22; Nightingale *v.* Burrill, 15 Pick. 110; Stehmen *v.* Stehmen, 1 Watts, 466; Doe *v.* Morgan, 3 T. R. 763; *Infra*, ch. 18, § 9; 4 Kent, Comm. 263; Willis *v.* Bucher, 3 Wash. 369; Hawley *v.* Northampton, 8 Mass. 3; Holm *v.* Low, 4 Met. 190; Haines *v.* Witmer, 2 Yeates, 400; Dunwoodie *v.* Read, 3 S. & R. 440.

Where there are successive limitations, and the first is executory, all the others will be executory, until the first limitation vests in possession; and then the subsequent limitations will be changed from executory devises to remainders, provided they can take effect as remainders. Vedder *v.* Evertson, 3 Paige, 281. See 2 Saund. 388 *h*, note by Williams; Lion *v.* Burtis, 20 Johns. 489.

[A limitation upon minorities is virtually a limitation upon lives. Taylor *v.* Gould, 10 Barb. Sup. Ct. 388.]

devise; for it cannot be a remainder, because the event on which a remainder is limited must not operate so as to abridge or determine the particular estate. So that in the case of Pells *v.* Brown, if the words, "*living William his brother*," had been omitted, it would clearly have been an estate tail in Thomas, with a remainder over to William, to take effect on the expiration of the preceding estate tail. (*a*)

13. It follows, that where there is a devise over after a preceding devise to a person and his heirs; if there are any words in the will, by which the first devise can be restrained to mean heirs of the body only, the first estate will be construed to be an estate tail, and the devise over a remainder.

14. The *essential difference between a contingent remainder and an executory devise is*, that the first may be barred or destroyed by several means; whereas an executory devise cannot be prevented from taking effect, when the contingency happens, either by fine or recovery; or by any alteration of the estate after which it is limited. (*b*)†

370* *15. Thus, in the case of Pells *v.* Brown, Thomas entered on the estate devised to him, and suffered a common recovery; but all the Judges, except Doderidge, held that the recovery did not bar the executory devise; for Thomas, the

(*a*) *Ante*, c. 12, s. 12. Tit. 16, c. 2, 3 Term R. 145.

(*b*) Tit. 16, c. 6. Fearne Ex. Dev. ed. 8, p. 418. [See Romilly *v.* James, 6 Taunt. 262, 272–3.] (4 Kent, Comm. 271. Boyd *v.* Bingham, 4 Barr, 102. Moffatt *v.* Strong, 10 Johns. 12. Jackson *v.* Bull, Ibid. 19. Jackson *v.* Robins, 16 Johns. 537.) [Downing *v.* Wherrin, 19 N. H. 9.]

[† To this general proposition the reader must be reminded, that there is the following qualification thus stated by Mr. Fearne: "Although in general an executory devise even of lands of inheritance, cannot be barred by the first taker, yet we are to observe, that where in lands of inheritance *an estate tail* is first limited, and then an executory or conditional limitation is made upon that estate, a recovery suffered by the tenant in tail, before the event or condition happens on which the ulterior limitation was to arise, will bar the estate depending on that event or condition;" and he cites the following authorities:—Page *v.* Hayward, 2 Salk. 570; Gulliver *v.* Shuckburg Ashby, 4 Burr. 1929. To this it may be added, that the executory devise must be so limited, after the estate tail, as to take effect, if at all, during the compass of the estate tail, or *eo instanti* that it determines, for otherwise the rules against perpetuities might be evaded. Hartop *v.* Lord Carberry, 1 Sand. Uses, 4 Ed. 197. See also Lanesborough *v.* Fox, 1 Cas. Temp. Talb. 262, and Bristow *v.* Boothby, 2 Sim. & Stu. 465.]

person who suffered the recovery, had a fee; and William Brown had but a possibility, if he survived Thomas; and Thomas dying without issue in his life, no recovery in the value should enure thereto, unless he had been a party by way of vouchee. (*a*)

16. A person granted several annuities, by deed, to his younger children; and afterwards devised all his lands to his elder son and his heirs, upon condition that he paid the annuities; and if he failed of payment, that the younger son should enter and have them. The elder son entered, and made a feoffment; and then the younger son entered for non-payment. It was held, that this entry was lawful, the contingent estate not being devested by the feoffment. (*b*)

17. In consequence of the rule that an executory devise cannot be barred, or prevented from taking effect, by any mode whatever; it became necessary to prescribe certain bounds and limits to executory devises, lest they should be used as a means of creating perpetuities. It was therefore established, by analogy to the case of strict settlements, that an executory devise *must vest within the compass of a life or lives in being, and twenty-one years and nine months after.* And the Courts have uniformly supported executory devises that are restrained within these limits. (*c*)

18. Thus, in the case of Pells *v.* Brown, the event on which the estate was devised over, namely the death of Thomas without issue, in the lifetime of William, being confined to the life of William, was held good. (*d*)

19. A person devised all his lands, after the death of his executor, to A and his heirs forever; but if he died leaving no son, then to that son or sons of his executor, which his executor should think fit to nominate. (*e*)

Lord Keeper Somers decreed, that this was a good executory devise; because the contingency was confined to the period of a life in being.

20. R. Ben, having a sister who had been formerly married to *one Smith, by whom she had issue, Augusta *371 Smith, and afterwards married one Wharton, by whom

(*a*) *Ante*, s. 5. (*b*) Mullineux's case, Palmer, 136.

(*c*) Tit. 32, c. 24. (Kevern *v.* Williams, 5 Sim. 171. Hawley *v.* Northampton, 8 Mass. 3. Anderson *v.* Jackson, 16 Johns. 399.) [Proprietors of Church in Brattle Square *v.* Grant, 3 Gray, 142.] (*d*) *Ante*, § 5. (*e*) Fairfax *v.* Heron, Prec. in Cha. 67.

she had issue, a son called Benjamin, and a daughter called Mary, devised his estate to his sister Elizabeth, for so long time, and until her son Benjamin Wharton should attain his full age of twenty-one years, and after he attained that age, then to the said Benjamin and his heirs forever; and if he died before his age of twenty-one years, then to the heirs of the body of Robert Wharton, and to their heirs forever, as they should attain their age of twenty-one years. The testator died; Benjamin died before he attained the age of twenty-one, living Robert his father; and afterwards Robert died. (*a*)

It was determined, that the executory devise to the heirs of the body of Robert Wharton was good. Now, the heirs of the body of Robert Wharton could not take until after their father's death; for *nemo est hæres viventis:* and since that heir of the body of Robert, who should attain twenty-one, might not have been born before his father's death, and the estate could not vest in him until he attained twenty-one, it follows that the estate might possibly not have vested under that limitation until twenty-one years after the determination of a life then in being.

21. Sir W. Stephens devised freehold estates to his grandson William Stephens, his heirs and assigns forever; but in case his said grandson W. Stephens should die before he attained his age of twenty-one years, then he gave the same to his grandson Thomas Stevens, his heirs and assigns forever; but in case his grandson Thomas Stephens should depart this life before he attained his age of twenty-one years, then he devised the said lands to such other son of the body of his daughter Mary Stephens as should happen to attain the age of twenty-one years, his heirs and assigns forever; the elder of such sons to take before the younger, &c.; and to the several and respective heirs male of the body of such son and sons, and the heirs male of the body of his and their body and bodies. And for default of such issue, he gave the said lands to all and every the daughter and daughters of the said Mary Stephens in tail male; and for want of such issue, he devised the said lands to his brother Sir Richard Stephens, his heirs and assigns forever. (*b*)

The testator died, leaving William and Thomas Ste-
372 * phens, his * two grandsons, who both died under age.

(*a*) Taylor *v.* Biddall, 2 Mod. 289. (*b*) Stephens *v.* Stephens, Forrest, 228.

Soon after the death of the testator, Mary Stephens had another son, who attained the age of twenty-one years; and the question was, whether this executory devise to such unborn son of Mary Stephens, as should attain the age of twenty-one years, was good.

Lord Talbot directed a case to be sent to the Court of King's Bench, and the Judges of that Court, Lord Hardwicke, and Justices Page, Probyn, and Lee, certified their opinion, that they did not find any case wherein an executory devise of a freehold had been held good, which had suspended the vesting of the estate till a son unborn should attain his age of twenty-one years, except the case of Taylor *v.* Biddall; and having caused the record to be searched, they found it agree in the material parts with the printed report. And therefore, however unwilling they might be to extend executory devises beyond the rules generally laid down by their predecessors, yet upon the authority of that judgment, and in conformity to several late determinations, in cases of terms for years, and considering that the power of alienation would not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity, and that this construction would make the testator's whole disposition take effect, which otherwise would be defeated, they were, therefore, of opinion that the devise before mentioned might be good, by way of executory devise.

22. In a case, which will be stated hereafter, it was held, that a devise to an infant *in ventre matris*, with a limitation over, upon failure of issue of his body at the time of his death, was good, which began with an allowance for the birth of a posthumous child, and might also conclude with it. (*a*)

23. Where an executory devise is limited on an event which may not happen within the period above mentioned; as *upon a general failure of heirs, or issue*, it is *void*, as *too remote*, and tending to a perpetuity.[1] Nor is it material, in such cases, how

(*a*) Long *v.* Blackall, *infra*, c. 19, § 22.

[1] The student will find the law, on this much vexed point, expounded by Chancellor Kent with his accustomed clearness and force, in 4 Kent, Comm. 273–279. See also the cases cited in his notes. The subject is treated more fully and with great research by Mr. Lewis, in his Practical Treatise on the Law of Perpetuity.

the fact actually turns out; for the possibility, at the creation of such executory limitation, that the event on which its existence depends may exceed, in point of time, the limits allowed, vitiates it *ab initio.*

24. But where the generality of the words "*heirs*" or "*issue*" is *restrained by any other words, to the period allowed,*
373* the devise *over will be good. Thus, a devise over, after a devise to a person and his heirs, in case the first devisee shall happen to die, *leaving no issue behind him,* has been held good; these words being construed to mean, having no issue living at the time of the person's death.[1]

25. A person devised a real estate in the following words — "*Item,* I give and devise unto my son P. D., his heirs and assigns forever, all the messuage and tenement wherein I now live. But my will is, that in case my son P. D. shall happen to die, leaving no issue *behind* him, then my said wife shall receive and take the rents and profits thereof." On a case sent from the

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It may be added, that, as the law forbids the creation of perpetuities, it is always to be *presumed,* that the testator did not *intend* to create any; and that therefore, when, in the devise of a fee, he speaks of the devisees "*dying without issue,*" he ought to be understood to mean, *without issue living at the time of his death,* and not an *indefinite failure of issue.* See, however, Dallam *v.* Dallam, 7 H. & J. 220; Hollett *v.* Pope, 3 Harringt. 542; Moore *v.* Howe, 4 Monr. 199, and the cases reviewed by Kent, C. J., in Moffat *v.* Strong, 10 Johns. 12; and see acc. Morgan *v.* Morgan, 5 Day, 517; Fosdick *v.* Cornell, 1 Johns. 440; Jackson *v.* Staats, 11 Johns. 337; [Bell *v.* Scammon, 15 N. H. 381; Hall *v.* Chaffee, 14 Ib. 215; Ferris *v.* Gibson, 4 Edw. Ch. 707; Toman *v.* Dunlop, 18 Penn. State R. (6 Harris,) 72; Jackson *v.* Dashiel, 3 Md. Ch. Decis. 257; Perry *v.* Logan, 5 Rich. Eq. 202; Hay *v.* Hay, 3 Ib. 384; St. Amour *v.* Rivard, 2 Mich. (Gibbs), 294; Proprietors of Church in Brattle Square *v.* Grant, 3 Gray, 142.]

In several of the United States, there are express statute enactments, providing, that when an estate is limited to take effect upon the death of the first taker *without issue* or *without heirs,* or *without heirs of his body,* it shall be understood to intend issue or heirs *living at the time of the ancestor's decease.* See *New York,* Rev. St. Vol. II. p. 10, § 22, 3d ed.; *Missouri,* Rev. St. 1845, ch. 32, § 6; *Indiana,* Rev. St. 1843, ch. 28, § 73; *Virginia,* Rev. St. Feb. 24, 1819, § 26; Tate's Dig. p. 336; *North Carolina,* Rev. St. 1837, ch. 122, § 11, ch. 43, § 3; *Mississippi,* Rev. St. 1840, ch. 34, § 26; *Michigan,* Rev. Stat. 1846, ch. 62, § 22; 4 Kent, Comm. 279, 280. See also, 2 Jarm. on Wills, ch. 41, Perkins's ed., where the effect of such expressions is amply discussed.

[1] A devise to his daughter A, for life, remainder to her *children* in fee; (she then having a child,) "provided if she die without "*issue,*" to his son B, is a good executory devise, and not too remote; the word "*issue*" being construed to mean the children before referred to. DeHaas *v.* Bunm, 2 Barr. 335. And see Heard *v.* Horton, 1 Denio, 165; Den *v.* Allaire, 1 Spencer, 6; Seddell *v.* Wills, Ibid. 223; Jones *v.* Price, 3 Desaus. 165.

Court of Chancery to the Court of K. B., one of the questions was what estate P. D. took under this will. (*a*)

Lord Kenyon and the other Judges were of opinion, that this case was not to be distinguished in principle from that of Pells *v.* Brown, and certified in the following words:—"Having heard counsel in the case above referred to us, we are of opinion, that P. D. took an estate in fee simple in the premises above devised to him. But as P. D. died without issue living at the time of his death, we are of opinion, that the further disposition made by the testator in that event, is good by way of executory devise."

26. A person devised a dwelling house to his grandson T. Triswell and his heirs forever. But in case his said grandson should depart this life, and *leave* † no issue, then his will was, that the said dwelling house, &c. should be and return to E., M. and S., or the survivors or survivor of them. (*b*)

Lord Kenyon said, nothing could be clearer in point of law, than that if an estate were given to A, in fee, and by way of executory devise, an estate was given over, which might take place * within a life or lives in being, and twenty- *374 one years and the fraction of a year after; the latter was good by way of executory devise. The question therefore in this and similar cases was; whether from the whole context of the will it could be collected that when an estate was given to A and his heirs forever, but if he died without issue, then over, the testator meant dying without issue living at the death of the first taker. That the rule was settled so long ago as in the reign of James I., in the case of Pells *v.* Brown: that case had never

(*a*) Porter *v.* Bradley, 3 Term R. 143. Doe *v.* Webber, 1 B. & Ald. 713.
(*b*) Roe *v.* Jeffery, 7 Term R. 589. (Atwell *v.* Barney, Dudl. 207.)

[† We may here notice the following observation of Mr. Fearne: "But though the Courts in the case of *personal* estates generally incline to pay attention to any circumstance or expression in the will that seems to afford a ground for construing a limitation after dying without issue to be a dying without issue living at the death of the party, in order to support the devise over; yet in the case of a *real* estate, it seems the construction is generally otherwise; for there we are to consider, the interest of the heir at law is concerned, which is always much favored by our laws." In support of this observation many late decisions might be cited, the following will be sufficient. Doe *v.* Ellis, 9 East, 382; Tenny *v.* Agar, 12 Ib. 353; Dansey *v.* Griffiths, 4 Man. & Sel. 61; Crooke *v.* De Vandes, 9 Vez. 197.]

been questioned or shaken, but had been adverted to as an authority in every subsequent case respecting executory devises. It was considered as a cardinal point on this head of the law, and could not be departed from without doing as much violence to the established law of the land (as it was supposed by the defendant's counsel) the Court would do, if they decided this case against him. (*a*)

On looking through the whole of the will, the Court had no doubt the testator meant, that the " dying without issue " should be confined to a failure of issue at the death of the first taker; for the persons to whom it was given over were then in existence, and life-estates only given to them. Taking all this into consideration together, it was impossible not to see that the failure of issue intended by the testator, was to be a failure of issue at the death of the first taker; and if so the rule of law was not to be controverted; it was merely a question of intention, and the Court was clearly of opinion, that there was no doubt about the testator's intention.[1]

27. In the case of a devise in fee simple, with an executory devise over, it has been held that *a right to curtsey attaches on the first estate*, and is not defeated by its determination.

28. Joseph Sutton devised to trustees and their heirs, in trust to apply the rents for the maintenance and education of his granddaughter Mary Barrs, till she should arrive at the age of twenty-one years, or be married; and from and after the said Mary Barrs should have attained her age of twenty-one years or should be married, he gave the said lands to the said Mary Barrs, her heirs and assigns forever; but in case the said Mary Barrs should die before she attained the age of twenty-one years, and without leaving issue, then from and after the decease
375 * of * the said Mary Barrs as aforesaid, he gave and devised the said estates to his grandson. Mary Barrs married Solomon Handford, and had a child who died in her lifetime; she died soon after, being under the age of twenty-one years,

(*a*) *Ante*, s. 5.

[1] See Anderson *v.* Jackson, 16 Johns. 382; in which this and the preceding case, together with the leading English, and nearly all the American decisions, on this much vexed question, are reviewed.

and without leaving any issue. Solomon Handford the husband received the rents of the estate during the coverture in right of his wife. (*a*)

A question was reserved for the opinion of the Court on this case, whether Handford was entitled to be tenant by the curtsey.

Lord Mansfield said, the right of tenant by the curtsey existed at the common law; and the necessary points were, that the wife be seised of an estate of inheritance, which by possibility might descend to her issue, and that issue should be born. Estates at common law were either absolute or conditional; curtsey was incident to both, and existed when the wife died without issue inheritable, which let in the reverter. As to fees conditional, the estate did not become absolute by the birth of a child inheritable, but in odium of perpetuities, it was for a special purpose become absolute, if issue were born; that is, the donee might aliene; but the estate was to descend and revert, according to the entail, if not aliened. At common law the only modification of estates expressly limited was by condition; the Statute of Uses introduced more qualifications of estates, expressly limited. About the reign of Elizabeth and James I. many cases in odium of perpetuities were determined, to prevent and defeat such an application of the Statute of Uses. The Courts leaned against contingent limitations over; but having gone a great way on that side, they began to think they went too far. New devices were contrived at the time of the troubles, and practised after the restoration, such as trustees to preserve contingent remainders, and executory devises. It was not long that the bounds of them had been settled: it was in his time that the Courts first held they might wait during a life in being, and twenty-one years after. Now it was contended that this was a conditional limitation: it was no such thing; there was no condition in it; it was a contingent limitation. If it was a limitation it did not defeat the right of the husband to be tenant by the curtsey; the husband might be tenant by the curtesy though *the estate was spent. But how was it *376 when she was alive? here the wife was seised in fee sim-

(*a*) Buckworth *v.* Thirkell, Collect. Jur. vol. 1, 332. 3 Bos. & Pul. 658.

ple during her life, and such an one as the issue might inherit, if they had not been disappointed by death.

Judgment was given, that Handford was entitled to be tenant by the curtesy. (*a*)

(*a*) *Vide* 1 Inst. 241 a, n.

CHAP. XVIII.

EXECUTORY DEVISES—DEVISE OF A FREEHOLD ESTATE TO COMMENCE in futuro.

SECT. 1. *Devise of a Freehold to commence in futuro.*
6. *Devise of this sort sometimes supported as Remainders.*
13. *Must vest within the Period allowed.*
18. *A Devise after a general Failure of Heirs or Issue is too remote.*
22. *Exceptions.* I. *A Devise of a Reversion.*
26. II. *A Devise in Default of Issue of the Devisor.*
30. III. *A Devise over for Life on Failure of Issue of the first Devisee.*
31. IV. *Where an Estate Tail is raised by Implication.*

SECTION 1. THE second sort of executory devise is *where the devisor*, without departing with the immediate fee, *gives a future estate of freehold*, to arise either upon a contingency, or at a period certain; unpreceded by, or not having the requisite connection with, any immediate freehold, to give it effect as a remainder. (*a*) [1]

2. Thus, where a person devised lands to J. S. for five years, to commence at the next Michaelmas after the death of the testator; remainder to C and his heirs. The testator died before Michaelmas. It was agreed, that the devise over was good as an executory devise. (*b*)

3. So, where A devised lands to B in fee, to commence and

(*a*) Fearne Ex. Dev. 399, ed. 8. (*b*) Pay's case, Cro. Eliz. 878. Forrest, 48.

[1] In several of the United States, freehold estates may be created, to commence *in futuro;* and it would seem that, therefore, a remainder in fee, limited contingently after a chattel interest, would be a good contingent remainder; and if so devised, it would still be a contingent remainder, according to the rule, stated *supra*, ch. 17, § 11, and not an executory devise. See *New York*, Rev. St. Vol. II. p. 11, § 24; *Virginia*, Tate's Dig. p. 175, § 24; *Mississippi*, Rev. St. 1840, ch. 34, § 27; *Indiana*, Rev. St. 1843, ch. 28, § 59; *Michigan*, Rev. St. 1846, ch. 62, § 24.

take effect six months after the testator's death; this was adjudged to be a good executory devise. (*a*)

4. A devise to an infant *in ventre matris*, is an executory devise of this kind; as it necessarily implies a disposition to take effect at the birth of the child. Such a devise was formerly held void; but it was always understood that a devise to an infant, when he should be born, was good as an executory devise. (*b*)

378* *5. Mr. Fearne says, where a particular estate of freehold is first devised, capable in its own nature of supporting a remainder, followed by a limitation not immediately connected with, or commencing from its expiration, as the latter limitation is incapable of taking effect as a remainder, there seems to be no obstacle to its validity as an executory devise. Therefore, although in the case of a lease for life to A, and after the death of A and one day after, that the land shall remain to B for life; it seems that the limitation to B is void as a remainder, because not to take effect immediately upon the determination of the first estate; yet in the case of a similar limitation by will, there appears to be no ground for denying effect to such ulterior limitation as an executory devise. (*c*)

6. In consequence of the rule already stated, that no devise shall be considered as executory, which may be supported as a remainder, several cases have arisen where there has been a devise of a particular estate, with a devise over, in which *the devise over has been held to be a remainder*, supported by the preceding particular estate. (*d*)

7. Thus, in Pay's case, Lord Talbot said, that if the testator had lived to Michaelmas, then it had been a good remainder. (*e*)

8. A testator devised to his wife for life, and to her son, after the death of his mother, if she should have a son; and if such son should die within age, then to the right heirs of the devisor. The testator died without issue; his wife married again, and had a son. It was adjudged, that the estate limited to that son, was not an executory devise, but a contingent remainder; because the mother had an estate of freehold capable of supporting it. (*f*)

(*a*) Clarke *v.* Smith, 1 Lutw. 798.
(*b*) 1 Freem. 244. 1 Wils. R. 206. Snowe *v.* Cuttler, 1 Lev. 135.
(*c*) Fearne, Ex. Dev. 397, Ed. 8. (*d*) *Supra*, ch. 17, § 11. (*e*) *Ante*, s. 2.
(*f*) Purefoy *v.* Rogers, 2 Saund. 380. (Lion *v.* Burtiss, 20 Johns. 489.)

9. George Mussell devised lands to Elizabeth his wife for life, remainder to his son Ebenezer Mussell, for ninety-nine years, if he should so long live; and after the several deceases of his wife and son, to the heirs of the body of Ebenezer. The question was, whether the devise to the heirs of the body of Ebenezer should be considered as an executory devise, or as a contingent remainder. (*a*)

Lord Kenyon said, if ever there existed a rule respecting executory devises, which had uniformly prevailed, without any exception to the contrary, it was that which was laid down by Lord Hale in the case of Purefoy *v.* Rogers. That where a contingency is limited to depend on an estate of freehold, *which is capable of supporting a remainder, it shall never *379 be construed to be an executory devise, but a contingent remainder. And, therefore, the Court determined, that the devise to the heirs of the body of Ebenezer was a contingent remainder, which was originally supported by the estate for life devised to Elizabeth, and was defeated by her death before that of Ebenezer.

10. Whenever the first devise can be construed to pass an estate tail only, the devise over will be deemed a remainder expectant on the determination of such an estate tail; and not an executory devise.

11. John Spalding having issue three sons, John, Thomas, and William, devised lands to John the eldest son, and the heirs of his body, after the death of Alice, the devisor's wife; and *if John died, living Alice*, that William should be his heir. (Also, he devised other lands to Thomas, and the heirs of his body; and if he died without issue, that then John should be his heir. And he devised other lands to William, and the heirs of his body; and *if all his sons should die without heirs of their bodies*, that then his lands should be to the children of his brother.) John died in the lifetime of Alice, leaving a son. (*b*)

It was determined, (upon the whole context,) that the construction of the will should be, that if John died *without issue*, living Alice, William should have the lands; and that it should not be construed, where he limited first to John, and the heirs of

(*a*) Doe *v.* Morgan, 3 Term R. 763. (Terry *v.* Briggs, 12 Met. 17, 22.)
(*b*) Spalding *v.* Spalding, Cro. Car. 185.

his body, that by this limitation he intended, if he died, living Alice, that William should be his heir, John having issue, and thereby to disinherit the heirs of John's body. (*a*)

12. A testator having charged certain legacies on his lands, devised, that in case his son T. should happen to die before he married, or being married should have no children, then his lands should remain and descend equally to his daughters and their heirs, paying, &c.; and in case both his daughters should die without being married, or being married should have no children, then he willed that all his estate should descend to I. M.; and at the end of the will he gave and devised all his estate, real and personal, not already disposed of by his will, to his son T. After the testator's death, his son T. entered, suffered a recovery, and died without issue; upon which his sisters entered, suffered a recovery, and died also without issue; and the heir of I. M. entered. The question was, whether the devise to I. M. was a remainder depending on a particular preceding estate in the son and daughters, or an executory devise. (*b*)

Lord Hardwicke said, there were two rules which went a great way in determining the case. First, that no limitation
380* should *be construed to be an executory devise, if it could be made good by way of remainder. Secondly, that it was immaterial in a will which words were first or last, as the construction must be made upon the whole will; and here, in the subsequent part of the will, there was an express devise of all the residue; so that, taking the two clauses together, there was an express devise to the son: and it was given by the word estate, which was sufficient to carry the fee; so that it amounted to a devise to the son and his heirs, and if he died without issue, remainder over; which was an estate tail. But if that were not so clear, yet as to the daughters no objection could be raised; for there was a devise to them, and if they died without issue, &c.; so that their recovery was sufficient to bar the remainder: and the limitation being clearly good as a remainder, could not be considered as an executory devise.

13. The rules established for preventing perpetuities are applied to the second sort of executory devises, as well as to the

(*a*) See Doe *v.* Micklem, 6 East, 486.
(*b*) Wealthy *v.* Bosville, Rep. temp. Hardwicke, 258.

first; and therefore, *in all cases* where a freehold estate is devised, to commence *in futuro, it must vest within the compass of a life or lives in being, and twenty-one years and some months after*, otherwise it will be void.[1]

14. It should however be observed here, that by the time of vesting is meant the vesting of freehold; for although lands should be limited for a long term of years, with remainder to the unborn son of a person then living, this executory devise to an unborn son would be good, because the vesting of the freehold is confined to the period of a life in being; for upon the birth of such son, the freehold would vest in him, or upon the death of such person without leaving a son, either actually born, or *in ventre matris*, it would vest in some other person, subject only, in either case, to the preceding term.

15. W. Gore devised certain lands to trustees and their heirs, to the use of the said trustees for five hundred years, upon several trusts, and from and after the determination of that estate, then to the use of the first and other sons of the testator's eldest son Thomas Gore in tail male, remainder over. Thomas Gore had no child when the testator died, but afterwards had a son. (*a*)

The Court of K. B. was of opinion, that the devise to the eldest son of Thomas Gore was void: that it could not be good as a remainder, for want of a freehold to support it, and that it could *not take effect as an executory devise, because it *381 was too remote, viz., after five hundred years. But the case having been sent to the Court of K. B. some years after, Lord Hardwicke, Ch. J., together with Justices Page, Probyn, and Lee, certified their opinion, against that of their predecessors, "that this was a good executory devise, and not too remote; for it must in all events one way or other happen upon the death of Thomas Gore, whether he should have a son or not; and either upon the birth of the son, or upon his death without issue, the freehold must vest."

(*a*) Gore *v.* Gore, 2 P. Wms. 28.

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[1] If an estate is limited upon the happening of either of two events, one of which is too remote, but the other is not; it will take effect upon the happening of the latter. Minter *v.* Wraith, 13 Sim. 52.

16. Where an estate is devised to a person upon an event which is too remote, a devise over depending on the same event is also void.

17. Mary Proctor devised to the first or other son of her grandson Thomas Proctor that should be bred a clergyman, and be in holy orders, and to his heirs and assigns, all her right of presentation to the rectory of West Coker: but in case her said grandson Thomas Proctor should have no son, then she gave the said presentation to her grandson Thomas Moore, his heirs and assigns forever. Thomas Proctor died without having ever had a son. The question was, whether these devises were good or not. (*a*)

It was contended that the first devise was void, as being too remote; for Thomas Proctor had no son born at the time of the death of the testatrix; and if he ever should have a son, he would not necessarily be in orders within twenty-one years after his birth. By the canons of the church no person could be admitted into deacon's orders, before the age of twenty-three, without a faculty; nor could he be ordained priest before twenty-four. And the devise to Thomas Moore was liable to the same objection, on account of the remoteness of the contingency on which it was to take effect; for supposing there had been no previous devise to the son of Thomas Proctor, the devise to Thomas Moore would be to him, if Thomas Proctor had no son in orders; but no time was fixed for his taking orders; and such devise being void in its original creation, could not be made good by the subsequent circumstance of Thomas Proctor's having no son; and the devise could not be considered as alternate. The Court was clearly of opinion, that the first devise to the son
382* of Thomas Proctor was void; from the uncertainty as *to the time when such son, if he had any, might take orders, and that the devise over to Moore, as it depended on the same event, was also void; for the words of the will would not admit of the contingency being divided, as was the case in Longhead *v.* Phelps. And there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take effect; but the contrary was expressly decided in the House of Lords, in the case of the Earl

(*a*) Proctor *v.* Ep. Bath, 2 H. Black. 358.

of Chatham *v.* Tothill, in which the Judges founded their opinion on Butterfield *v.* Butterfield. Consequently the heir at law of the testatrix was entitled. (*a*)

18. In consequence of the rule that an estate devised, to commence *in futuro*, must vest within the period above mentioned; *a devise after failure of the heirs or issue* of A, where no estate is already vested or given by the express words of the will, or arises by implication to such heirs or issue, is *void in its creation.* For if A should have heirs or issue, they might last forever, and while they did last, there would be nobody who could bar the estate thus devised; so that a perpetuity would be created.

19. T. C. being tenant for life, with remainder to his wife for life, remainder to his own right heirs, made his will, in which were these words: — "*Item*, my land at W. my wife Mary is to enjoy for her life; after her death, it of right goes to my daughter Elizabeth forever, provided she has heirs. But if my said daughter dies before her mother, or without heirs, and my said wife Mary should marry again, and should have heirs male, I bequeath all my said right in W. to her heirs male by her second husband." Mary the wife died before Elizabeth the daughter, but Mary had married a second husband, and had issue male; and the question was, whether the devise to them was good. (*b*)

It was resolved, that no estate was devised to the daughter; what was said in the will respecting her, being only a declaration how she was to enjoy the estate; for the testator could not say, "It of right goes to my daughter," if she claimed under the will. It was, therefore, a devise after a general failure of heirs of the daughter, which was too remote.

20. Sir George Lane, upon the marriage of his son James Lane, settled certain lands to the use of himself for life, remainder *to his son James Lane for 99 years, if he *383 should so long live, remainder to trustees and their heirs during the life of James, to support contingent remainders; remainder to the first and other sons of the said James by his then intended wife, successively in tail male; remainder to the heirs male of the body of James; remainder to the right heirs of Sir George. The marriage was had, and afterwards Sir George

(*a*) 2 Black. R. 704. 6 Bro. Parl. Ca. 451. 1 Ves. S. 134. [See also Beard *v.* Wescott, 5 B. & Ald. 801, S. C. 1 Turn. 25.]

(*b*) Wright *v.* Hammond, 8 Vin. Ab. 110. 1 Stra. 427.

made his will, and devised the lands comprised in the settlement, on failure of issue of the body of James Lane, and for want of heirs male of his own body, to his daughter Frances Lane, and the heirs of her body. And in a subsequent part of his will he devised, that if his son James should die without issue male, and his (the testator's) wife survived him, his wife should have his house and park at R. during her life. After the death of Sir G. Lane, (who became Lord Lanesborough,) leaving the said James his only son and heir, and two daughters by his first wife, and the said Frances Lane by his second wife, the trustees joined with James Lane in making a tenant to the *præcipe;* and a common recovery was suffered of the estates comprised in the settlement. James Lane, Lord Lanesborough, died without issue, and Frances Lane married Henry Fox, and died, leaving issue George Fox her eldest son, who brought an ejectment for the recovery of the estate. (*a*)

A special verdict was found, and judgment was given in the Courts of Exchequer and Exchequer Chamber in Ireland, for the plaintiff Fox.

An appeal was brought to the House of Lords of England, and two questions were put to the Judges. I. Whether Lord James took any other or greater estate by the will, than by the settlement? To which they answered, that Lord James could not take any estate tail, no alteration being made by the will; and that no estate was raised to Lord James by implication. II. Whether Frances Lane took any estate under the will of Lord George? To which they answered, that she took no estate whatever, but that the devise to her was absolutely void in its creation, as being on too remote a contingency. Whereupon the judgment was reversed. (*b*)

21. Mrs. Mostyn, on the marriage of her niece Mrs. Wynn, who afterwards became her heir at law, with Doctor Wynn, entered into articles, covenanting to settle an estate for life
384 * on Mrs. * Wynn, with remainder to the issue of that marriage in tail, with the reversion to herself in fee, whenever Doctor Wynn should have settled his own estate to the same uses. Mrs. Mostyn by her will, reciting the articles, gave

(*a*) Lanesborough *v.* Fox, 3 Bro. Parl. Ca. 130. [Fearne, Ex. Dev. 447, ed. 8.]
(*b*) Cases temp. Talbot, 267. *Vide infra*, s. 24.

her equitable reversion in the premises to the heirs of the body of Mrs. Wynn by any after-taken husband, and for want of such issue, remainder over to Charles Lloyd in tail. Mrs. Wynn died without issue, living her husband. (*a*)

It was determined, that this was a future executory devise of the reversion to the heirs of the body of Mrs. Mostyn, by her second husband, during the first marriage, on failure of heirs of her body by her first husband; which was too remote, and therefore void.

22. There are, however, *some cases in which a devise, after a general failure of heirs or issue, is good. First,* where a person entitled to a reversion, expectant on the determination of an estate tail, devises the lands to another, after failure of issue of the tenant in tail; this is held to be an immediate devise of the reversion, and therefore good. For the estate devised commences on the death of the testator; and the words which have a future prospect are used to denote, not the commencement of the estate devised, but the event on which the estate shall take effect in possession; and there can be no danger of a perpetuity, because the reversion thus devised may be barred at any time by a recovery, suffered by the person having the preceding estate tail. (*b*)

23. Thus where a person conveyed his estate to the use of himself for 99 years, if he should so long live, remainder to his wife in the same manner; remainder to his son in the same manner; remainder to trustees and their heirs, during the lives of the father and son, to preserve contingent remainders; remainder to the first and other sons of the son in tail male; remainder to the father in fee. The father made his will, and after reciting the settlement, devised the lands, after the death of his son without issue male, to another son. (*c*)

It was objected, that the devise was executory; and as it could only take effect on the death of the son without issue, it was void, as being too remote. But to this it was answered, that here a man entitled to a reversion, expectant on an estate tail, devised it, after the death of the tenant in tail without

(*a*) Goodman *v.* Goodright, 1 Black. R. 188. 2 Doug. 507, n. (2 Burr. 873.) *Vide* Fearne's Cont. R. 8th ed. 456. [Habergham *v.* Vincent, 5 T. R. 92. 2 Ves. 204. Banks *v.* Holme, 1 Rus. 394, note.]

(*b*) [3 Atk. 449.]

(*c*) Badger *v.* Lloyd, 1 Ld. Ray. 523. 1 Salk. 232.

385* *issue, to another: this was not an executory, but an immediate devise; and the words, "*from and after*," were only a declaration when it should take effect in possession. If the son had not an estate tail in the land, but the devises had been after the death of a stranger without issue, they would have been executory devises, and void by reason of the remoteness of the possibility; but here they were limited after the determination of the particular estate.

24. In the case of Lanesborough *v.* Fox, Mr. Fearne observes, that the limitation to the daughter was future, to arise after failure of issue of the body of James Lane, and the heirs male of the body of the testator. Now there was no subsisting estate extending to the issue of the body of James Lane generally, the settlement being confined to his first and other sons in tail male, and the heirs male of his body; nor indeed was there any estate tail in the testator himself to extend to the heirs male of his own body; therefore, the estate devised by the testator to his daughter could not be considered as a reversion expectant on such preceding estates. And though it should be granted that as the testator had but one son, and there was a limitation by the settlement to the first and other sons of such son in tail male, the devise, for want of heirs male of the testator's own body, might have been construed as a devise of the reversion, expectant on failure of the sons of his son, and the heirs male of their bodies; yet, as there was no preëxisting estate extending to issue female of the body of James Lane, it was impossible to consider the devise on failure of issue generally of the body of James Lane, as the devise of a reversion expectant on failure of such issue; there being no preceding estate extending to that period; consequently, unless such a preceding estate was raised by implication, which was not admitted, the devise to the daughter was not the devise of a reversion, but was an executory limitation, unsupported by any preceding estate; and being not to take effect till after a general failure of issue, was therefore too remote. (*a*)

25. Sir William Morgan, upon his marriage with Lady Rachael Cavendish, settled certain estates in the counties of Monmouth and Glamorgan, upon himself for life, remainder to trustees to

(*a*) *Ante*, s. 20. Fearne's Ex. Dev. 447, ed. 8.

support contingent remainders; remainder, subject to a jointure rent-charge to his wife, to his first and other *sons *386 by Lady R. C. successively in tail male; reversion to himself in fee. Afterwards, Sir W. Morgan, having two sons by that marriage, William and Edward, made his will; and after giving certain specific things to his wife and his sons, and making a disposition of other lands in the said counties, which he had purchased after his marriage, he proceeded in these words: "And forasmuch as it is my will, intent, and meaning, that in case my said two sons now living, or any other son or sons of mine lawfully begotten, hereafter to be born, should die without issue male of their bodies, or of the body of some or one of them lawfully to be begotten; after their respective decease, without issue male as aforesaid, that then all and singular my messuages, &c., within the several counties of Monmouth and Glamorgan, and not hereinbefore devised, shall be devised and settled to and for the several uses, intents, and purposes hereinafter mentioned, limited, expressed, and declared: it is therefore my will, intent, and meaning, that in case my said sons William and Edward, or any other son or sons of mine hereafter to be born as aforesaid, shall happen to die respectively without any issue male of their bodies, or of the body of some or one of them as aforesaid; and in such case, if it shall so happen, then I give and devise the remainder of all and singular my messuages, &c., within the several counties of Monmouth and Glamorgan, and not herein and hereby before devised, and the reversion and reversions, remainder and remainders of the same premises, to my said brother, Thomas Morgan, for and during the term of his natural life, but subject nevertheless to the several provisoes and payments mentioned and contained in my said marriage settlement." The testator then limits the same lands to trustees, during the life of Thomas Morgan, to preserve contingent remainders; remainder to Thomas Morgan, the son of the said Thomas Morgan during his life; remainder to his first and other sons in tail male, with divers remainders over. (*a*)

The testator died, leaving his said wife, and his said two sons, and also two daughters by her. And one of the questions upon this will was, whether the residuary devise over to Thomas Mor-

(*a*) Jones *v.* Morgan, 3 Bro. Parl. Ca. 323. Fearne's Cont. Rem. (8th edit.) App. No. 3.

gan and his son was not void, as being a future limitation, not to take effect till after the failure of issue of persons who took no preceding estate; namely, of all the other sons of Sir
387* William *Morgan by any future wife. For the limitation to Thomas Morgan was not expressed to take effect upon failure of issue male of the testator's sons by his then wife, in which case it would have been good as an immediate devise of the reversion, expectant on the estates in tail male limited to such sons by the settlement; but the words were general and comprehensive, extending in point of expression as well to the future sons of the testator, by any after-taken wife, as by his then wife; and if so, this limitation could not be a devise of the reversion immediately expectant on the estates subsisting, or created by the settlement, but was a future devise, without any preceding estate to support it; and then, as it could not take effect as a remainder, it could be considered only as an executory devise; in which light it must be void, for it was too remote, as being limited to vest on a general failure of issue.

In support of the devise, it was contended, that the testator had not a future marriage in view, or any children not provided for by the settlement. That this appeared from his giving some specific legacies to his wife, naming her one of his executors, and one of the guardians of his children. Therefore the words, "*or any other son or sons*," &c., should be understood as confined to sons by his then wife; and under that construction the limitation in question would be as good as an immediate devise of the reversion, subject to the estates created by the settlement; or that if those words did extend to children by a future marriage, still the limitation in question might be supported, by raising implied estates tail to such children.

Upon a case stated for the opinion of the Court of K. B., the Judges of that court certified,—" They were of opinion, that the event of a second marriage was not in the testator's contemplation; but supposing that, from the generality of the description, the words "*any after-born son*," should be extended to the son of any future marriage; they were of opinion that from the manifest intent of the testator, expressly declared in his will, such son must take an estate tail. Consequently, they were of opinion that, either way, a remainder after estates tail, was devised to

Thomas Morgan, who by virtue of the said limitation, upon failure of the sons of the testator without issue male, was entitled to all the lands in the counties of Monmouth and Glamorgan, *devised by the residuary clause in the said will, for life; with remainder according to the limitations in the said will." *388

Lord Bathurst decreed accordingly. He concurred entirely with the opinion certified by the Judges, in regard to the event of a future marriage not being in the testator's contemplation; and consequently that the words, "*or any other son or sons*," were to be restrained to sons of the first marriage. But as to the raising an estate tail to any sons of a future marriage, he expressed himself inclined to the opinion, that he was bound by the decision of the House of Lords, in the case of Lanesborough *v.* Fox, as a direct authority against the admitting such implication.

Upon an appeal to the House of Lords this decree was affirmed, agreeably to the unanimous opinion of the Judges, founded, as appeared by what was expressed by the Ch. J. of the Court of Common Pleas in delivering their opinion, upon the very same ground to which Lord Bathurst seemed to think himself confined, namely, the presumption that the event of a future marriage was not in the testator's contemplation; and that therefore the words, "*or if any other son or sons*," &c., must be understood of sons of the testator by his then wife. (*a*)

26. *Secondly, a devise in default of issue of the devisor's own body*, has been construed to be a conditional devise, to take effect at the death of the testator; and has, therefore, been held not to be executory, because it must be determined at the instant when the will takes effect; that is, at the death of the testator.

27. James Farrel by his will devised, upon default of issue male and female of his own body, all his estate in the counties of Galway, &c., to Peter and Denis Daly and their heirs, in trust to pay all his just debts; and after payment thereof, and securing the provision made to his wife, he limited his estate in the county of Galway to the use of John Kelly, jun., for life, re-

(*a*) Fearne's Ex. Dev. 453, ed. 8. [Morse *v.* Lord Ormonde, 1 Rus. 382. Egerton *v.* Jones, 3 Sim. 409.]

mainder to trustees to support contingent remainders, remainder to his first and other sons in tail male, with several remainders over. (*a*)

The Court of Chancery of Ireland decreed, that this devise was good.

On an appeal to the House of Lords of England, it was contended, that this devise being to take place on failure of
389* the issue *male and female of James Farrel, whensoever the same should happen, without any thing contained in the will to restrain the contingency to his own death, or any other particular time, it was void.

On the other side it was argued, that the devise under the will of James Farrel was at his death a devise in possession, and not an executory devise. No estate was limited to the issue by the will, but it was plain he meant a failure of issue living at the time of his death. The first trust was to pay debts, legacies, and annuities to his sisters for their lives; and he could not have intended that those trusts should take place a hundred or two hundred years after his death. The legacy given by a codicil to J. C., of which the first payment was to be made on the first of November next after his decease, showed what he meant by dying without issue; namely, if he should have no issue when his will should take effect; and the codicil was expressed to be in addition to the will, and directed that the will should stand in all points not thereby altered, and therefore the legacies were by the will and codicil payable only on the event of his dying without leaving issue at his death; and by this construction none of the dangers could arise which prevent the effect of executory devises, nor was any rule of law broken. The decree was affirmed.

28. On a case sent out of Chancery for the opinion of the Court of K. B. the facts were,—Richard Cary, after directing all his debts to be paid, devised thus: "*Item*, in default of issue of my own body, I give to trustees and their heirs, &c. in trust to pay my sister an annuity of £100 till my debts and legacies are paid, and after payment thereof, to my sister for life, with divers remainders over, in strict settlement." (*b*)

(*a*) French *v.* Caddell, 3 Bro. Parl. Ca. 257. Sanford *v.* Irby, 3 B. & Ald. 654.
(*b*) Wellington *v.* Wellington, 1 Black. R. 645.

It was objected, that this devise to the trustees being after an indefinite failure of issue, was executory and too remote; to which it was answered, that it was not executory, but depended on a precedent condition upon which the testator intended the whole should take effect. That the words "*in default of issue*" were different from the words "*on failure of issue:*" the one implied that the devisor never should have issue; the other, that he should have issue, which should afterwards fail. The first contingency must be determined at his own death; the latter might be suspended for ages.

* The Court certified, that the devise was good; that *390 the trustees took a base fee, determinable on the payment of the testator's debts and legacies out of the profits of the estate. And Sir William Blackstone says, that he thinks this certificate was principally founded on the idea of the will's being merely conditional, in case the devisor left no issue of his body.

29. J. R. Lytton, being an infant, entered into articles on his marriage, by which he agreed to settle his estate, after his own decease, to the intent that his intended wife should receive a certain jointure, and subject thereto to the first and other sons of the marriage in tail, remainder to himself in fee. J. R. Lytton suffered a recovery when he came of age, but never made a settlement in pursuance of the articles. Fifteen years after, being in a weak state of health, and his wife living, he made his will; and having given his wife a rent-charge in satisfaction of the articles, he gave and devised his estate, on failure of issue male of his body, to trustees, to raise money for the payment of his debts, and subject thereto to his nephew in strict settlement. (*a*)

Lord Northington declared, that the devise to the nephew, after a general failure of issue male, was void, the contingency being too remote.

Upon a bill of review, Lord Loughborough said, this case did not appear to have been determined after that deliberation which would give it the sanction due to a decree of Lord Northington. The case of Lanesborough *v.* Fox, was considered as governing this case; but when fairly examined, there could not be a greater

(*a*) Lytton *v.* Lytton, 4 Bro. C. C. 441.

dissimilitude. Here the testator had had no child for several years, his only child was just dead, the devisee was his next and immediate heir; but he introduced the devise by the words, "*in failure of issue male.*" Could this mean more than to take in the event which alone prevented the estate from being the subject of an immediate devise? He certainly had the articles in contemplation; there was no prospect of issue at the time. It was not like Lord Lanesborough's case, who had issue, and might have many more; it would be a harsh construction that the testator had here the idea of a future issue in contemplation, and an indefinite failure of that issue. He meant to give an immediate estate in possession at his decease; every clause in the will showed his intention. It was manifest he had no
391* intention of giving an estate after a general failure * of issue. The circumstances of the testator and his family had always been taken into consideration in these cases.

Decreed, that the declaration made by Lord Northington should be reversed.

30. Thirdly, an *executory devise over for life*, to a person *in esse*, to take place *after a dying without issue of the first devisee*, may be good; because the future limitation being only for the life of a person *in esse*, it must necessarily take place during that life, or not at all; and therefore the failure of issue in that case is confined to the compass of a life in being. (*a*)

31. There are also several cases in which the Courts have supported a devise over, after a general failure of heirs or issue, by raising *an estate tail by implication* in the person, on the failure of whose heirs or issue the estate is devised over; for in that case the second devise is supported as a remainder, expectant on the determination of such prior estate tail.

32. Thus, in a case which has been already stated, the Court having held that the first devisee took an estate tail by implication, it followed that the devise over was good as a remainder. (*b*)

33. In another case, which has been stated in this chapter, the Judges of the Court of K. B. appear, from their certificate, to have been of opinion, that if a second marriage was in the con-

(*a*) Fearne's Ex. Dev. 488, ed. 8. Oates *v.* Chalfont, *infra.*
(*b*) Walter *v.* Drew, *ante*, c. 12.

templation of the testator, then an estate tail was raised by implication to the sons of that marriage, and, therefore, that the devise over was good, as a remainder expectant on the determination of that estate tail. (*a*)

(*a*) Jones *v.* Morgan, *ante*, s. 25.

CHAP. XIX.

EXECUTORY DEVISES OF TERMS FOR YEARS.

SECT. 1. *A Bequest over of a Term for Years is now good.*
5. *And a similar declaration of the Trust of a Term.*
6. *Though to a person not* in esse, *or not ascertained.*
9. *The first Devisee cannot bar the Devise over.*
13. *Must vest within the Period allowed.*
14. *Cannot be limited after a general Failure of Heirs or Issue.*
SECT. 18. *Unless such Failure is confined to the Period allowed.*
24. *The words "Dying without Issue" sometimes restrained to the Death of a Person* in esse.
31. *No Distinction between an Express Estate Tail, and one by Implication.*
33. *Nor between a Devise for Life and an indefinite Devise.*
36. *An executory Devise for Life after a general Failure of Issue, is good.*

SECTION 1. [THE third sort of executory devises comprises all that relate to chattels.] (*a*)

1. Upon the first introduction of long terms for years, it was held, that if a term for years was given to a person for life, with a remainder over, the bequest of the remainder was void; because an estate for life being of greater estimation, in the eye of the law, than the longest term for years, it was concluded that the limitation of a term for years to a person for life was a complete disposition of it, and therefore that nothing remained to be given over. Another reason for this doctrine was, that the possibility of a term's continuing longer than the life of the person to whom it was first bequeathed, was not such an interest as by the rules of law could be limited over.

2. A *distinction* was, however, made between a *bequest of the use of a personal thing*, and a *bequest of the thing itself;*
393* in the **former* case a *devise over of it was held good;* and when long and beneficial terms for years came into general use, the convenience of families requiring that they might

(*a*) [Fearne's E. D. 401, ed. 8.]

be settled in the same manner as freehold estates, it was fully established, that a bequest of the residue of a term for years, after a previous disposition of it for life, was good; and this doctrine was confirmed by the two following determinations. (*a*)

3. Edward Manning, being possessed of the moiety of a mill for the term of fifty years, made his will in writing, and thereby devised his indenture and lease of the said mill, and all the years therein to come, to Matthew Manning, after the death of Mary Manning his wife; which mill, his will was, that Mary his wife, should enjoy during her life, conditionally that the said Matthew Manning should not devise, sell, or give the said lease, but leave it wholly to John his son. (*b*)

It was resolved by Lord Coke and the other Judges, that the devise to Matthew Manning was good; that he took it not by way of remainder, but by way of executory devise; and that there was no difference when one devised his term for life, the remainder over, and when a man devised the land, or his lease or farm, or the use, or occupation, or profits of his land; for in a will, the intent and meaning of the devisor was to be observed, and the law would make a construction of the words to satisfy his intent, and to put them into such order and course that his will should take effect; and always the intention of the devisor expressed in his will was the best expositor, director, and disposer of his words; and when a man devised his lease to one for life, it was as much as to say, he should have so many of the years as he should live, and that if he died within the term, another should have it for the residue of the years; and although at the beginning it was uncertain how many years he should live, yet, when he died, it was certain how many years he had lived, and for how many years the other should have it; and so by a subsequent act all was made certain.

4. J. Morris, being possessed of a house for the term of 500 years, devised it to his father for the term of his natural life, and after his decease, the remainder of the said house to Elizabeth the sister of the testator, and to the heirs of the body of the said Elizabeth. (*c*)

Upon the question, whether this executory devise, after the

(*a*) Welcden *v.* Elkington, Plowd. 519. (*b*) Manning's case, 8 Rep. 95.
(*c*) Lampet's case, 10 Rep. 46.

394 death of the testator's father, was good, when the term itself, and not the use or occupation of it for life, was devised to the first devisee for life, it was resolved, that in such case also the executory devise over was good, and that the assent of the executor to the first devisee should enure to the other.

5. The *same necessity* which induced the Judges to allow of *executory bequests of terms of years*, required that similar dispositions should be allowed in *deeds* by which the *trusts of terms* were declared. Thus, Lord Mansfield has said: — "When long and beneficial terms came in use, the convenience of families required that they might be settled upon a child after the death of a parent; such limitations were soon allowed to be created by will, and the old objections were removed by changing the name from remainders to executory devises. The same reason required that such limitations might be created by deed, as, for instance, marriage settlements, to answer the agreement of parties and exigencies of families." (*a*)

For these reasons it was settled in the reign of King Charles II., that the limitations of the *trust of a term* should be governed and guided by the *same rules in equity* as the devise of a *term* was *at law;* and that such limitations as would be good in one case, would be so in the other, and *e converso.* (*b*)

6. *Although the person* to whom a term for years is bequeathed over, after a previous disposition of it to another for life, be *not in esse*, or *not ascertained*, still *the bequest over will be good.*

7. A termor for years devised the term to his wife for eighteen years, and after to his eldest son for life, and after to the eldest issue male of that son for life. (*c*)

It was held, that although the eldest son had not any issue male at the time of the devise and death of the testator, yet, that if he had issue male at his death, such issue male should have it, as an executory devise; for that, notwithstanding its being a contingency upon a contingency, and the issue not being *in esse* at the time of the devise, yet inasmuch as it was limited to the son but for life, it was good, and all one with Manning's case.

(*a*) 1 Burr. R. 284. (*b*) 1 Vern. 235.
(*c*) Cotton *v.* Heath, 1 Roll. Ab. 612. 1 Ab. Eq. 191.

8. Although a bequest of a term for years to a person and the heirs of his body vests the entire and absolute property of the term in him, if not restrained by subsequent words, yet if a bequest * over of it is made, which is within the rules * 395 established for preventing perpetuities, it will be supported as an executory devise. (*a*)

9. It was resolved in Manning's case, and also in Lampet's case, that in bequests of this sort, after the executor has assented to the first bequest, it is not in the power of the first taker to bar the bequest over, or executory devise; for he cannot transfer more to another than he has himself.

10. Mr. Fearne says, it seems to follow, as a consequence of this exemption of executory interests from the power of the first devisee or legatee, that where there is an interest devised to one for life, &c. out of a term, and then an executory devise over of the residue of the term to another, any subsequent union of the freehold or inheritance with the interest so given to the first devisee, or a feoffment or other act of forfeiture by such first devisee, will not extinguish or affect the interest of the ulterior devisee: for if it could, the executory interest might easily be annihilated, without any prejudice to the temporary interest of the first devisee, by collusion betwixt him and the reversioner. (*b*)

11. A person possessed of a house for a term of years, devised the profits thereof to I. during the time she should continue sole, and then devised the term to R. and died. I. entered by assent of the executor; and afterwards purchased the fee. (*c*)

It was resolved, that although the whole term was in I., *quousque*, &c., so that by the purchase of the fee simple *her* interest became extinct, yet the same did not defeat the executory devise to R., but that after the marriage of I., and not before, he might enter.†

12. In the case of Cotton *v.* Heath, the eldest son to whom the term was devised for life, made a feoffment of the lands; whereupon the reversioner in fee entered for the forfeiture; and

(*a*) *Ante*, c. 11. Duke of Norfolk's case, *infra*. (*b*) Fearne, Ex. Dev. 521, ed. 8.
(*c*) Hammington *v.* Rudyard, cited 10 Rep. 52, a.

[† A distinction was formerly admitted between a devise of a *term* and a devise of the land, which is now exploded.—*Note to former edition.*]

it was decreed, that the feoffment and entry for the forfeiture did not destroy the executory bequest. (*a*)

13. When it was established, that an *executory bequest of a term for years* could not be barred, it became necessary to apply the same rule to this kind of limitation, as to executory devises of estates of inheritance; namely, that it should *vest*
396 * *within the * compass of a life or lives in being, and twenty-one years and some months after.*

14. In consequence of this principle, it has been long settled, that where a *term for years* is limited over *after a general and indefinite failure of heirs or issue*, it is *void*, as being too remote.

15. A lessee for 1000 years devised his term to L.; and if he died without issue, then to B. The Court held, that the devise over was void, and that the whole estate vested in L., his executors and administrators. (*b*)

16. A person devised a term for years to his wife for life, and after her decease, to Nicholas his son for his life; and if Nicholas his son should die without issue of his body begotten, then he devised it over to Barnaby. (*c*)

The whole Court was unanimously of opinion, that the bequest to Barnaby was void; for that, as he could not take until the death of Nicholas without issue, it was the same in effect as if it had been to Nicholas and the heirs of his body, with remainder to Barnaby; which would have been clearly bad; because after a term was devised to one and the heirs of his body, no other limitation, or any appointment of it by way of executory devise, could be made; for the law would not presume any term to have continuance so long as issue of the body might continue; and therefore a limitation after an indefinite failure of issue, depended upon too remote a possibility.

17. In cases of this kind, the bequest over cannot be supported as a remainder, by raising an estate tail in the first taker; because a term for years cannot be entailed; nor can a remainder over be limited of a term, after a disposition of it to a person and the heirs of his body, because such a disposition gives the entire and absolute property of the term, so that nothing remains to be given over. (*d*)

(*a*) *Ante*, s. 7.
(*b*) Burford *v.* Lee, 2 Frem. 210.
(*c*) Love *v.* Wyndham, 1 Mod. 50. 1 Lev. 290.
(*d*) See Brouncker *v.* Bagot, 1 Mer. 271. [Elton *v.* Eason, 19 Vez. 73.]

18. It was formerly held, that though the failure of heirs or issue was confined to the period of a life in being, yet the bequest over was void. But this doctrine was departed from in the reign of King Charles II., and it was held, that where a term of years was limited over, upon failure of heirs or issue, if there were words to *restrain the failure of such heirs or issue within the compass of a life or lives in being, and twenty-one years* **and some months after*, the *limitation would be good;* as being within the rule established by the courts, for preventing perpetuities. (*a*) *397

19. Henry Frederick, Earl of Arundel, by indentures of lease and release, dated in 1647, settled the barony of Graystock, and other estates, on himself for life, remainder to his lady for life, remainder to trustees for a term of 200 years, remainder to his second son Henry Howard in tail male, remainder to his third son Charles Howard in tail male, remainder to all his other sons successively in tail male, remainder over. And by another deed of the same date, the Earl of Arundel declared the trust of the term of 200 years to be, that the said term should attend the inheritance; and the profits of the said barony, &c. should be received for the said term of 200 years by Henry Howard and the heirs male of his body, so long as Thomas Lord Maltravers, the eldest son of the said Earl of Arundel, or any issue male of his body, should be living; but in case Lord Maltravers should die without issue male, *in the life of Henry Howard*, not leaving his wife *ensient* with a son, or in case, after the death of Lord Maltravers without issue male, the honor of the earldom of Arundel should descend to Henry Howard, then he and his issues to have no benefit of this term of 200 years, but it was to descend to the other brother, Charles Howard, the plaintiff. (*b*)

The Earl of Arundel died in 1652; his lady died in 1673; and in 1675 Lord Dorchester, who was the surviving trustee of the term, assigned it to one Marriot, who assigned it to Henry Howard, who suffered a recovery of the estate to the use of himself in fee. In the year 1677, Thomas Lord Maltravers, the elder brother of Henry, who became Duke of Norfolk by the death of his father, died without issue, whereby the dukedom

(*a*) Child *v.* Baylie, *infra.*

(*b*) Duke of Norfolk's case, 3 Cha. Ca. 1, 14. 2 Cha. R. 119. Pollexf. 223.

descended to Henry; and the plaintiff Charles Howard's bill was to have execution of the trust of the term, to him and the heirs male of his body.

The cause was argued before Lord Chancellor Nottingham, assisted by the Chief Justices North and Pemberton, and Lord Ch. Baron Montague.

The two Chief Justices and the Chief Baron agreed, that the limitations of trusts of terms for years, and executory
398* devises *of them, ought to be governed by the same rules. That no limitation over of a term for years, after an estate to a person and the heirs of his body, had ever been permitted: that as no direct remainder could be limited over in such a case, so neither could a contingent remainder be limited over, though the event on which it was limited should happen ever so soon. That the case of Child *v.* Baylie was a positive authority against the validity of a limitation of this kind, the admission of which would be productive of perpetuities. They were therefore unanimously of opinion, that the limitation over to Charles Howard was void.

Lord Nottingham said, (*a*) the great objection which had been made to the validity of this limitation was, that it tended to a perpetuity. A perpetuity was the settlement of an estate or interest in tail, with such remainders expectant on it as were not in the power of the tenant in tail to dock, by any means whatsoever, but must continue as perpetual clogs on the estate. But future interests, springing trusts, or trusts executory, and remainders which were to arise upon contingencies, were quite out of the rules and reason of perpetuities, if they were limited on events which must soon happen.

No principle of law had been laid down oftener than this, that there could be no remainder of a freehold estate limited after a fee simple; yet the nature of things, and the commerce between man and man, had induced the Judges to relax this rule, and allow of executory fees in devises, and conveyances to uses. But it was said that a lease for years, which was but a chattel, would not bear a contingent limitation, on account of its meanness. As to this point, the difference between a chattel and an inheritance was a difference only in words, and not in reason;

(*a*) See the judgment extracted from Lord N.'s MSS., 2 Swanston, 454.

for the owner of a lease had as absolute a power over it, as a person who was seised in fee had over the inheritance. If a springing trust of a term was not allowed, as well as a springing use of an inheritance, men possessed of terms for years would not be capable of making that provision for their families which the laws of every country ought to support.

Suppose a man possessed of no other property than a long term for years, should, on the marriage of his son, assign the term to trustees, in trust for himself and his executors, till the marriage took effect; and from the solemnization of the marriage to the son for life, remainder to his wife for life, &c.; this would *not be a void limitation in a marriage settle- *399
ment. And if this springing trust, to arise on the contingency of a marriage was good, why should not the springing trust in the present case be equally good? If the estate had been limited to Henry Howard and the heirs male of his body, until the death of Thomas Lord Maltravers without issue generally, and then to Charles, the limitation would certainly have been void; but the addition of the words,—"If Thomas Lord Maltravers die without issue in the lifetime of Henry," entirely altered the case; as the event on which the term was limited over was thereby circumscribed to the period of a life then in being; and as a chattel interest would bear a remainder over, where there was no danger of a perpetuity, it must of course bear a remainder over upon a contingency which must inevitably happen during the existence of a life in being.

The principal authority against the plaintiff was the case of Child *v.* Baylie. (*a*) That case was variously reported; the true state was this:—A term of seventy-six years was devised by a person to his wife for life, then to his son William and his assigns for all the rest of the term; provided that if William died without issue then living, the term should go over to Thomas; which he agreed was the same as the then present case. The remainder to Thomas was held to be void in its creation; but the resolution in that case went upon several reasons which were not to be found in this case; and besides, that case had been contradicted since.

In a subsequent case, (*b*) the trust of a long term was limited

(*a*) Cro. Jac. 459. (*b*) Wood *v.* Saunders, Pollexf. 35.

to the father for sixty years, if he should so long live, then to the mother in the same manner, then to John, the son, and his executors, if he survived his father and mother; and if he died in their lifetime, having issue, then to his issue; but if he died in the lifetime of his father and mother without issue, then remainder over to his brother. John died without issue, in the lifetime of his father and mother; and the question was, whether the limitation over to the brother was good.

It was resolved by Lord Keeper Bridgman, assisted by Twisden and Rainsford, Justices, that the limitation over to the brother, was good; as the contingency on which it was to take place must happen during the existence of two lives then in being. Thus it appeared that Sir Orlando Bridgeman, who
400* *drew the deeds in this case, continued of the same opinion that he was of when a conveyancer.

It was decreed, that the limitation over to Charles Howard was good.

Upon a bill of review, this decree was reversed by Lord Keeper North; but an appeal being brought in the House of Lords, the decree of reversal was reversed, and Lord Nottingham's decree finally established. (*a*)

20. Upon a special verdict the case was thus: A devised a long term for years to his son B and the heirs male of his body, and if he died without issue, leaving his mother, then that it should go over to his son C. The contingency happened: and it was resolved, that the devise over to C was good, upon the reason and authority of the Duke of Norfolk's case. (*b*)

In another report of this case, (*c*) it is said the Court, without any difficulty, held it a good limitation, by way of executory devise, to C; and that it did not tend to a perpetuity, as was suggested; and denied the case of Child *v.* Baylie, but said that the established law in cases of this nature was according to the resolution in the Duke of Norfolk's case.

21. A person devised a term for years to his wife for life, and after her death to B. F. for her life, and after her death to T. F. and his children, and then devised in these words:—"And if it shall happen that the said T. F. do die before the expiration of

(*a*) 19 June, 1685. Journ. v. 14, p. 49.
(*b*) Lamb *v.* Archer, Comb. 208. [1 Salk. 225.] (*c*) Carth. 266.

the said term, not having issue of his body then living," then to go over to the plaintiffs, for the residue of the term. This bequest was held good, the failure of issue being confined to the life of T. F. (*a*)

22. In a case sent from the Court of Chancery for the opinion of the Court of K. B., it was stated, that George Blackall being possessed of a term for years, devised it, after the death of his wife, to the child with which the testator's wife was then *ensient;* in case it should be a son, during his life; and after his decease, then to such issue male, or the descendants of such issue male of such child, as at the time of his death should be his heir at law: and in case that at the time of the death of such child there should be no such issue male, nor any descendants of such issue male, then living, or in case such child should not be a son, then he bequeathed the same to Philippa Long, her executors, &c. (*b*)

* The wife of the testator was *ensient* at the time of making the will, and when the testator died; and had a son, who died without issue. *401

The question directed by the Chancellor was, whether the limitation to Philippa Long was good.

Lord Kenyon said, the rules respecting executory devises had conformed to the rules laid down in the construction of legal limitations; and the Courts had said, that the estate should not be unalienable by executory devises, for a longer time than was allowed by the limitations of a common-law conveyance. In marriage settlements the estate might be limited to the first and other sons of the marriage in tail; and until the person to whom the first remainder was limited, was of age, the estate was unalienable. In conformity to that rule, courts of law have said,—So far we will allow executory devises to be good. To support this decision he could refer to many others; but it was sufficient to mention the Duke of Norfolk's case, in which all the learning on this head was gone into; and from that time every Judge had acquiesced in that decision. It was an established rule, that an executory devise was good, if it must necessarily happen within a life or lives in being, and twenty-one years and the fraction of another year, allowing for the time of gestation.

(*a*) Fletcher's case, 1 Ab. Eq. 193. (*b*) Long *v.* Blackall, 7 Term R. 100.

Mr. J. Lawrence said, the devise over in this case must take effect, if at all, after a life which must be in being within nine months after the devisor's death.

The Judges certified, that the limitation to Philippa Long was good.

23. It is observable, that this case began with a devise to a posthumous child for life, with a limitation over, upon failure of issue of his body at his death, which of course would include an heir male then *in ventre sa mere;* for as the devise began with an allowance for the birth of a posthumous child, and also might conclude with it, the time might be claimed twice over; and so the time allowed for the birth of a posthumous child, after lives in being, and twenty-one years, might be enlarged to two periods of gestation. But this determination has been confirmed after great deliberation in a subsequent case, which will be stated hereafter. (*a*)

402 * *24. In the case of executory bequests of terms for years, the Court of Chancery has very much inclined to lay hold of any words in a will to restrain the generality of the words, *dying without issue*, and to confine them to a dying *without issue living at the time of the person's decease*, in order to support the intention of the testator; for by this construction the devise over becomes valid, being confined to the period of a life in being. (*b*)

25. One possessed of a term for years, bequeathed it by his will to his son Henry for life, and no longer; and after his decease, to such of the issue of the said Henry, as Henry by his will should appoint; and in case Henry should die without issue, the testator devised the same to his brother Albinus for the residue of the term, and died. (*c*)

Henry died without issue living at his death; whereupon the question was, whether the term should go to the executors of the first testator, or to the executors of Henry, or to Albinus.

It was objected, that the devise over of a term, upon a dying without issue, was void; being too remote an expectancy, and tending to a perpetuity.

(*a*) Thellusson *v.* Woodford, *infra*, c. 20.
(*b*) Barlow *v.* Salter, 17 Vez. 479. Donn *v.* Penny, 1 Mer. 20.
(*c*) Target *v.* Gaunt, 1 P. Wms. 432.

Lord Chancellor Parker held, that the expression, dying without issue, had two senses; first, a vulgar sense, and that was, dying without leaving issue at the time of his death; secondly, a legal sense, and that was, whenever there was a failure of issue. And if this will was taken in a vulgar sense, viz: if Henry died without leaving issue at the time of his death, then the devise over to Albinus was good. Now this seemed to be the meaning of the testator in this case: for it must be intended *such issue* as he should, or at least might, appoint the term to; which must be intended issue then living: and this construction should be the more favored, in regard it supported the will; whereas the other destroyed it. (*a*)

Therefore the Court held, that the devise over of the term to Albinus was good; and observed, that there was a great diversity betwixt a devise of a freehold estate to A, for life, and if A dies without issue, then to B, and a devise of a term in the same words. For, in the former case, this might give A an estate tail: because the words, if A die without issue, in case of an inheritance, are inserted in favor of the issue, and to let in the issue after the death of the father. But in the case of a term, these words could not have such effect, for the father takes the *whole, which on his death will not go to his issue, but *403 will belong to his executors. (*b*)

26. A term for years was devised to William and Walter Gore; and if either of his nephews William or Walter should depart this life, and leave no issue of their respective bodies, then he gave the said leasehold premises to the daughter of his brother. (*c*)

Sir Joseph Jekyll was of opinion, that the devise over was void; and said, that had the words been, if A or B should die without issue, remainder over, this plainly would have been void, and exactly the case of Love *v.* Wyndham. (*d*)

On an appeal to Lord Chancellor Parker, the decree was reversed; and his Lordship said, if a term was devised to A, and if A die without leaving issue, remainder over;—in the vulgar and natural sense this must be intended, if A died without

(*a*) [Sheppard *v.* Lessingham, Amb. 122. Kirkpatrick *v.* Kirkpatrick, 13 Vez. 476.]
(*b*) *Ante*, c. 12.
(*c*) Forth *v.* Chapman, 1 P. Wms. 663. [See 9 Vez. 203, per Ld. Eldon.]
(*d*) *Ante*, s. 16.

leaving issue at his death; and then the devise over was good. That the word "*die*" being the last antecedent, the words, "*without leaving issue*," must refer to that. Besides, the testator, who was *inops consilii*, would, under such circumstances, be supposed to speak in the vulgar, common, and natural, not in the legal sense.

He likewise took notice, that in a *formedon* in remainder, where a tenant in tail left issue, which issue afterwards died without issue, whereupon such writ was brought, the *formedon* would say that the tenant in tail died, leaving issue J. S., which J. S. died afterwards without issue; and so the first donee in tail died without issue. Thus the pleading says that the donee in tail died leaving issue at his death, consequently the words, leaving issue, refer to the time of the death of the tenant in tail; and if the words of a will could bear two senses, one whereof was more common and natural than the other, it was hard to say the Court should take the will in the most uncommon meaning, to destroy it.

He said the reason why a devise of a freehold to one for life, and if he died without issue, then to another, was determined to be an estate tail, was in favor of the issue, that such might have it, and the intent take place. But that there was the plainest difference between a devise of a freehold, and a devise of a term for years. For in a devise of the latter to one, and if he
404 * died without issue, then to another, the words, "*if he *died without issue*," could not be supposed to have been inserted in favor of such issue, since they could not by any construction have it. (*a*)

27. E. Baxter being possessed of a term for forty years, devised it to trustees, in trust for the testator's wife for life, and after her death to the use of such children as the testator should leave at the time of his death; and in case all his said children should die without leaving any issue, then to the use of J. H. (*b*)

Lord Talbot said, where words were capable of a twofold construction, even in the case of a deed, and much more in that of a will, it was just and reasonable that such construction should be received as tended to make it good. And in this case the

(*a*) Taylor *v.* Clarke, 2 Eden, 202. (*b*) Atkinson *v.* Hutchinson, 3 P. Wms. 258.

devise of the term to the testator's children, and if they should die without issue, then to J. H., might easily and naturally be understood to signify, if they died without leaving any issue at the time of their death; nay, much more naturally than in the other case, viz. if there should be a failure of issue of them a hundred years after. He cited the cases of Target *v.* Gaunt, and Forth *v.* Chapman, and decreed in favor of the devise over, namely, that the words, "*if the first devisee died without leaving any issue*," must be understood to mean without leaving issue at his death. (*a*)

28. A person being possessed of a term for years, bequeathed that his brother William Tristram should have the use thereof, for so many years of the term as should expire in his lifetime; and after his decease, his will was, that his executors should permit all and every the child and children of the said William Tristram, their executors, &c. respectively, to hold and enjoy the same for his and their proper use, during the remainder of said term, in such manner as the said W. Tristram should by his will or deed in writing, &c. direct: and for want of such appointment, then equally share and share alike, without any benefit of survivorship. But if it should happen that the said W. Tristram should die without issue in the lifetime of John and Tristram Tolcher, or either of them, then his will was, that the said John and Tristram Tolcher, if they both survive the said W. Tristram, dying without issue as aforesaid, should equally have the benefit and advantage thereof. It was held by Sir L. Kenyon, M. R., *that the bequest over was void; but *405 Lord Thurlow reversed the decree. (*b*)

29. A person possessed of a term for years, bequeathed it to his grandson T. B. Peake, son of D. and S. Peake, and the heirs lawful of him forever; but in case he should happen to die, and *leave* no lawful heir, then and in that case he gave it, after the death of the said T. B. Peake, to the next eldest son or heir of the said D. and S. Peake. T. B. Peake took possession of the term in question, under the will, and died without issue. (*c*)

Lord Kenyon said, that on conference with the rest of the Court, they were clearly of opinion, that the limitation over was

(*a*) *Ante*, ss. 25, 26. (*b*) Att.-Gen. *v.* Bayley, 2 Bro. C. C. 553.
(*c*) Goodtitle *v.* Pegden, 2 Term R. 720. [Porter *v.* Bradley, 3 Ib. 143.]

good. This was a chattel interest, limited to T. B. Peake, and the heirs lawful of him forever: but in case he should happen to die and leave no lawful heir, then over. Now it was apparent on the will, that the testator, by lawful heirs, meant heirs of the body; and that leaving no lawful heir, must be confined to leaving no issue at the time of his death.

30. The following case was sent by the Master of the Rolls for the opinion of the Court of K. B. (*a*)

A person bequeathed a leasehold estate to his wife Mary Parker, during the term of her natural life, and after her decease to go to his son S. Parker, and to the heirs of his body lawfully begotten, and their heirs and assigns forever; but in default of such issue, then, after his decease, to go to his (the testator's) grandson T. Wilkinson, his heirs and assigns forever. S. Parker entered on the estate upon the death of the testator, Mary Parker being then dead, and died without ever having had any issue. The question was, whether T. Wilkinson took any thing under the will?

Lord Kenyon.—"We will send our certificate in this case. But I will now state the short ground on which my opinion is founded. The only question is, whether on the fair construction of the words of this will the testator meant, that the limitation over to T. Wilkinson the plaintiff should take effect after an indefinite failure of issue in S. Parker, or on a failure of issue living at the time of the death of S. Parker; for as soon as that intention is discovered, there is an end of the case. If personal property be so limited, that if it were an estate of inheritance, it would give an estate tail, the absolute interest vests in
406* the first *taker; but if the limitation be with a double aspect to A and to the issue of his body, if there be any such issue living at his death, if not then over, it is a good limitation. It was so settled in Sabbarton *v.* Sabbarton, and a variety of other cases, some of which are not in print. Here the words of the will are, 'to S. Parker and the heirs of his body, and to their heirs and assigns forever.' If those words stood uncontrolled by any thing subsequent in the will, the absolute interest would have vested in him; but other words are added, 'but in default of such issue, then *after his decease*, to go to the testator's

(*a*) Wilkinson *v.* South, 7 Term R. 555.

grandson.' There is a case in the books to show, that "*then*" and "*when*" are adverbs of time. Then at what time was the estate to go over to the testator's grandson? at the death of S. Parker, if he left no issue. There is nothing in the will to show that the testator intended that the limitation over should not take effect until future generations; but on the contrary, there is sufficient to show that he intended that the estate should, in one event, vest in the grandson at the time of S. Parker's death, and that is within the time which the law allows in the case of executory devises. (*a*)

"The rule respecting executory devises is extremely well settled; and a limitation by way of executory devise is good, if it may take place after a life or lives in being, and within twenty-one years and a fraction of another year afterwards. As I before observed, this is a question of intention; and I am clearly of opinion, that the testator's intention was, that if S. Parker did not leave any issue at his death, the subsequent limitations should take effect."

The Court certified, that T. Wilkinson was entitled, under the will of E. Parker, to the absolute and entire interest in the leasehold premises. †

31. Mr. Fearne says, a diversity has in some cases been contended for between a limitation of a term, by such words as, in the case of a real estate, would give an *express estate tail*, and a limitation of the same by such words as, in the case of a real estate, would give only an *estate tail by implication;* upon this *principle, that where the words of a will, if *407 used with regard to an inheritance, would give an express estate tail, there the same words, applied to a term, would pass the whole interest in the term. But that where the words of the will if applied to the freehold, would give an estate tail by implication only, there they would not enure to give the whole interest in that term; and consequently, that where a term was limited to one, and if he died without issue, remainder over, this

(*a*) Forrest, 245.

[† See also Trotter *v.* Oswald, 1 Cox, 317; Rackstraw *v.* Vile, 1 Sim. & Stu. 604; Doe *v.* Frost, 3 B. & Ald. 541. But the words "without having," have been held not synonymous with the words "without leaving," but in some cases have been construed "without having had." Bell *v.* Phyn, 7 Ves. 454, 458; Weakley *v.* Rugg, 7 T. R. 322; Stone *v.* Maule, 2 Sim. 490.]

limitation would not vest the whole term in him, as a limitation to the heirs of his body, or to his issue, would do; but were always to be understood restrictively, and to relate only to his dying without issue living at his death; and therefore gave him the term only during his life. (*a*)

32. The ground of the distinction is this: in respect to an inheritance, the words "*dying without issue*," are taken to mean an indefinite failure of issue in order to create an estate tail in favor of the issue who are capable of taking an inheritance; but with respect to a term, such a construction cannot benefit the issue, because a term cannot descend to them. In some instances the Court seems to have countenanced a distinction of this sort; but in all those cases there were some circumstances in the will, which the Court observed, confined the generality of the expression, "*dying without issue*," to dying without issue then living. But it has been frequently determined, that the limitation of a term over, after a dying without issue, even in such cases where the limitation could only have given an estate tail by implication in a real estate, is to be taken in the legal extent of the expression, and therefore the limitation over being in that sense too remote, is utterly void. (*b*)

33. It is the *same thing*, whether a devise of a term be to one *for life expressly*, and if he die without issue, remainder over; or to one *indefinitely*, and if he died without issue, remainder over. (*c*)

34. Thus, in the case of Love *v.* Wyndham, the devise was to one for life expressly, and if he died without issue, remainder over; and yet the remainder was held void. (*d*)

35. W. Clare being possessed of a long term, devised it to trustees, in trust for his son Thomas Clare, for so many years of the term as he should live; and after his death, in trust for the issue male of his son Thomas, lawfully begotten, for so
408 * many * years of the said unexpired term as such issue male should live; and when the issue male of his said son Thomas should happen to be extinct, then in trust for his second son, in the same manner. (*e*)

(*a*) Fearne, Ex. Dev. 477, ed. 8. 1 P. Wms. 433, 3-268.
(*b*) 1 P. Wms. 667. *Vide* Fearne, Ex. Dev. 478, ed. 8.
(*c*) [Fearne. E. D. 485.] (*d*) *Ante*, s. 16.
(*e*) Clare *v.* Clare, Forrest, 21.

The question was, whether the limitation over to the second son, after failure of issue male of Thomas, was not void. Lord Talbot held, that the subsequent limitation to the issue of Thomas did not enlarge the express estate for life given to him; but he also held, that the remainder over upon the extinction of issue male of Thomas, which was equivalent to a dying without issue, when taken as an indefinite failure of issue, was void. (*a*)†

36. An *executory devise of a term for years for life, to a person in esse, to take place upon a dying without issue of another*, may be *good*, because the future limitation being only for the life of a person then existing, must necessarily take place during that life or not at all; and therefore the failure of issue is, in that case, confined to the compass of a life in being.

37. W. Wilson being possessed of a term for years, assigned the same to trustees, in trust that he should receive the profits during his life; and after his death for Mary his wife, during her life; and after her death, that John Oates should receive a moiety of the profits during his life; and after his decease, his child or children during his, her, and their lives; and for want of such issue, or after the decease of the child or children of Edward Oates, to permit Sarah Chalfont to receive the profits during her life. (*b*)

The question was, whether the limitation to Sarah Chalfont was good; and the Lord Keeper Finch declared, that the trust being expressly limited for life, the same did not tend to a perpetuity, and therefore was good. (*c*)

(*a*) *Vide* Fearne, Ex. Dev. 487. (*b*) Oates *v.* Chalfont, Pollex. 38.
(*c*) 3 Atk. 449. Doe *v.* Lyde, 1 Term R. 593.

[† The authority of this case, it should seem, is overruled as is the first point, viz.: that the bequest did not give a *quasi* implied entail to Thomas Clare: it is questioned in Knight *v.* Ellis, 2 Bro. C. C. 577. See also the authorities cited in the note Forr. 26, Ed. 1792. In Phipps *v.* Lord Mulgrave, Lord Loughborough, C., observed, "I have taken it to be most perfectly understood that Clare *v.* Clare was destroyed by Sabbarton *v.* Sabbarton." Forr. 245. See Britton *v.* Twining, 3 Mer.176, 183. In Andree *v.* Ward, 1 Russ. 260, Ib. 262, the reader will find an instance where the life-estate was not extended by implication to a *quasi* entail. On the construction of limitations of chattels real and personal estate in wills, see Roper's Legacies, 2 vol. 445, 479, Ed. 1828.]

CHAP. XX.

OTHER MATTERS RELATING TO EXECUTORY DEVISES.

SECT. 1. *Where one Limitation is executory, all the others are so likewise.*
5. *A preceding executory Limitation may be uncertain when a subsequent one may be certain.*
11. *A preceding executory Limitation is not a condition precedent.*
17. *Limitations over after an Executory Devise of the whole Interest, sometimes good.*
22. *Distinction between Cases where a subsequent Limitation may become good or not.*
24. *A Limitation which was originally a Contingent Remainder, may take Effect as an Executory Devise.*
SECT. 30. *Dinction between Executory Devises* per verba de præsenti *and* per verba de futuro.
35. *The Freehold descends in the mean time.*
38. *And also the intermediate Profits.*
41. *Which will pass by a Devise of the Residue.*
44. *Executory Interests are Devisable.*
48. *And also Assignable.*
51. *Might before Stat.* 3 & 4 *Will.* 4, *be passed by Fine or Recovery, and may be Released.*
52. *Descendible and transmissible to Heirs and Executors.*
55. *Chancery will restrain Waste.*
57. *Trust of Accumulation confined to the same Period as Executory Devises.*

SECTION 1. IT is laid down by Mr. Fearne, that where *one limitation* of a devise is taken to be *executory*, all *subsequent limitations must likewise be so taken.*[1] Thus Serjeant Pemberton says, the several limitations of a devise of one and the same thing shall never be made to operate several ways, viz., some by

[1] But whenever the first limitation vests in *possession*, those that follow vest in *interest* at the same time, and cease to be executory, and become mere vested remainders, and subject to all the incidents of remainders. 2 Saund. 388 *h*, note by Williams; Hopkins *v.* Hopkins, Cas. temp. Talb. 44; Stephens *v.* Stephens, Ibid. 228; Doe *v.* Fonnereau, 2 Doug. 487; See *supra*, ch. 17, § 11, note; Lion *v.* Burtiss, 20 Johns. 489.

way of executory devise, and others by way of remainder. The Court seemed to admit the distinction; but it may be proper to consider upon what reasons it is grounded. (*a*)

*2. With respect to the devise of a term, it is clear *410 that if there be twenty limitations of it after a devise to one for life, &c., every one of the twenty, will be equally as executory as the first of them; because all are equally limitations of a term, after a disposition thereof for life; which cannot hold otherwise than by way of executory devise. Therefore the question can only arise in regard to the devise of a freehold; and then we are to consider that every executory devise is either the limitation of an estate after the fee has been already disposed of, or else is a freehold to commence *in futuro*, without any preceding freehold to support it. In the first case, it is evident that every limitation subsequent to the first executory devise, must also be executory; because it is also a limitation of an estate after the fee has been already disposed of. In the latter case the first executory limitation, being the first freehold limited by the will, no freehold can vest in possession under that will, before the time appointed for such limitation to take effect; if it could, then would that supposed limitation be really not executory; because it would in that case be supported by a preceding freehold. (*b*)

3. It is true that in relation to contingent remainders, a subsequent remainder may vest in interest before a preceding contingent remainder; but that is only where some preceding freehold vests in possession in the mean time. But no subsequent remainder can first vest in possession, and afterwards a preceding estate take place; for wherever a subsequent limitation vests in possession, before a preceding contingent one can arise and vest, such preceding one is utterly precluded and destroyed. But in the case now under consideration, there is no freehold limited to vest immediately in possession; we cannot make the preceding estate and the remainder change places, and the latter come into possession before the former; this would be absurd, and directly contrary to the order of limitations. If this cannot be done, then no one of the subsequent limitations can take place, before the time limited for the first; they are all

(*a*) Carth. R. 309, 310. (*b*) Idem.

therefore equally freeholds to commence *in futuro*, without any present limitation, or estate of freehold to support them; and consequently they are all equally executory, till the time comes for the first estate to vest, or fail; then all the limitations to persons *in esse*, and ascertained, may vest, and no longer continue executory. (*a*)

4. Thus in the case of Gore *v.* Gore, it was held, 411* that till the *event of Thomas Gore's having a son should be decided one way or other, by the birth of such son, or by Thomas Gore's death without one, the devise to his son was executory, being a freehold limited to commence *in futuro*. (*b*)

5. A *preceding executory limitation* may however be *uncertain and contingent*, when a *subsequent limitation*, though it be to take effect in future, may *not* be *uncertain and conditional;* otherwise than in respect of the possibility of its expiration before the former vests, or fails; but may be so limited as to take effect, either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases it must vest at the time appointed for the preceding limitation to vest; for should the preceding limitation fail of taking effect, the subsequent one will then vest in possession. Should the preceding take effect, the subsequent one will at the same time vest in interest, as a remainder upon the preceding one, and then become liable to the same modes of destruction to which other remainders of the same kind are subject.

6. A person devised to trustees and their heirs, to receive the rents and profits till J. B. should attain twenty-one; and if he should live to attain the said age of twenty-one, or have issue, then to the said J. B. and the heirs of his body; but if the said J. B. should happen to die before the age of twenty-one, and without issue, then over. (*c*)

Lord Hardwicke, considering the word "*and*" as used for "*or*," and the condition as disjunctive, instead of copulative, decreed that the remainder over should take effect, upon the apparent intent of the testator that it should take place, either in

(*a*) Tit. 16, c. 1. (*b*) *Ante*, c. 18, s. 15.

(*c*) Brownsword *v.* Edwards, 2 Vez. 243. See Doe *v.* Jessep, 12 East, 288. [10 B. & Ald. 201.]

default of J. B.'s attaining twenty-one, or on his dying without issue.

7. A married woman, in pursuance of a power, devised the profits of her estate to her husband for his natural life, and after his death, she bequeathed the said estate to her children, if she should leave any to survive her; but in case she should leave no such child or children, nor the issue of such child or children, and after the decease of her husband, then she gave and bequeathed the said estates to her friend J. H., making him thereby her sole heir of her last will and testament, in default of issue left by her, and after the death of her husband. (*a*)

*At the time of making her will, the testatrix was with *412 child, and soon after had a daughter, and died.

Lord Hardwicke held, that the child took an estate tail, and not a fee; and that the devise over to J. H. was a vested remainder, and not a limitation to take effect only on the event of the testatrix dying without *leaving* any child, or the issue of any living at her decease. He said the testatrix had only expressed the double contingency, which there is in the case of every limitation in remainder after an estate tail; namely, there being no issue at all, or such issue dying without issue.

8. A distinction, however, must be made between cases of this nature, and the case where a testator devised to B., his son and heir; and if he died before twenty-one, and without issue of his body then living, the remainder over, &c. B. survived the twenty-one years, and then sold the lands, and died. It was held, that he had a fee simple immediately; for the estate tail was limited to arise upon a contingency subsequent. (*b*)

9. And also where a person devised lands to his wife, till his son came of age; and then that his son should have the land, to him and his heirs; and if he died without issue before his said age, then to his daughter and her heirs. This was held to be a good executory devise to the daughter, if the contingency happened; and if he lived to twenty-one, though he after died without issue, or left issue, though he died before twenty-one, yet the daughter was not to have the land; because he was to die without issue, *and* before twenty-one, or else the daughter could not take. (*c*)

(*a*) Southby *v.* Stonehouse, 2 Vez. 610.
(*b*) Collenson *v.* Wright, 1 Sid. 148.
(*c*) 1 Ab. Eq. 188, pl. 8.

10. It is observable, that in the two last cases, the devise to the son was in fee, so as not to admit a regular remainder after it; whereas in that of Brownsword *v.* Edwards, the first devise was in tail; upon which Lord Hardwicke laid so much stress, as to say, that had the devise been to B. and his heirs, the construction he gave could not, he believed, be made; for where there was such a contingent limitation, he did not know that the Court had changed the word heirs into heirs of the body, to make it so throughout. (*a*)

11. It has been observed in a former title, that where a devise is made upon a condition annexed to a preceding estate, that is, where it is made after a preceding executory or contingent limitation; or is limited to take effect on a condition annexed
413* to any preceding *estate; if that *preceding limitation* or contingent estate never should arise or take effect, the remainder over will nevertheless take place; the first estate being considered only as a preceding limitation, *not as a preceding condition*, to give effect to the subsequent limitation. (*b*)

12. A person devised a term for years to his wife for life, and after her death, to the child she was then *ensient* with: and if such child died before it came to twenty-one, then he devised one third part of the same term to his wife, her executors, administrators, and assigns, and the other two thirds to other persons. (*c*)

One of the questions was, whether the devise to the wife, of one third part of the term, was good; because it appeared that she was not *ensient* at all, and so the contingency upon which the devise to her was to take place never happened. And Lord Harcourt held it was good.

13. A case arose in the Court of K. B. upon the same will, and Lord Ch. J. Lee delivered the opinion of the Court,—"That the limitation over was good; that the devise to the infant, being ineffectual, was out of the case; and the law the same, whether the devise immediately preceding the limitation over was originally void, or became so by non-existence or non-entity of the person: for that, since the law allows such a limitation over, it allows the waiting for it. That it was one of those executory

(*a*) *Ante*, s. 6. (*b*) Tit. 16, c. 1, s. 63 & 74. [Fearne, Ex. Dev. 510, ed. 8.]
(*c*) Jones *v.* Westcomb, 1 Ab. Eq. 245.

limitations which depend on some contingency, on the failure of a preceding limitation, none of which take in all the ways of failing; but still it was the same thing." (*a*)

14. The above resolution was upon the leasehold part of the estates, which passed by the will. But afterwards the same point, in regard to the freehold lands, came before the Court of C. B.; the Judges of which were of opinion, that the event of no child's being born, was a *casus omissus*, concerning which no direction was given by the will; that the rule was, that an heir at law was not to be disinherited, but by express words or necessary implication: therefore upon that ground the devise over could not take effect. (*b*)

That the case of Andrews *v.* Fulham, being a determination on the leasehold, was distinguishable; that the plaintiff there had assented to the devise over, and so was concluded; and that there was a difference of construction between the leasehold
* and the freehold, because of the favor shown to the heir *414
at law.

15. Upon this another ejectment was brought in B. R., where Lord Ch. J. Lee delivered the opinion of the Court, that the devise over was to be considered as a limitation subsequent; the first as a preceding limitation, not a condition, which, whatever way it was laid out of the case, the other took effect. That the true construction of the will was, that there was a good devise to the wife for life, with a contingent remainder to the child in fee, with a devise over; which they held a good executory devise, as it was to commence within twenty-one years after a life in being; and if the contingency of a child never happened, then the last remainder was to take effect, upon the death of the wife; and the number of contingencies was not material, if they were all to happen within a life in being, or a reasonable time after. (*c*)

16. Serjeant Urling devised his real estate to his brother G. Urling and his heirs, on this express condition, that within three months after his decease, his brother should execute and deliver to his trustee a general release of all demands which he might claim on his estate, for what cause soever. But if his brother

(*a*) Andrews *v.* Fulham, 1 Ves. 421.
(*b*) Roe *v.* Wicket; 1 Ves. 421. 1 Wils. R. 107. 3 Burr. 1624. Willes, 303.
(*c*) Gulliver *v.* Wickett, 1 Wils. 105.

should neglect to give such release, the said devise to him should be null and void to all intents; and in such case he devised it to Richard Ward, his heirs and assigns forever. (*a*)

G. Urling died in the lifetime of the testator. It was decreed, that the devise over should take place; and though a distinction was contended for between the case of a remainder over, after an executory particular estate only, and those cases wherein an executory devise was introduced, after a disposition of the whole fee, yet Lord Hardwicke exploded that distinction, because he did not find any authority to warrant it. (*b*)

17. It seems now to be settled, that whatever number of *limitations* there may be *after the first executory devise of the whole interest*, any one of them which is so limited, that it must take effect, if at all, within twenty-one years and some months after the death of a person then existing, *may be good in event;* if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent lim-
415 * itations * become void, and the whole interest is then become vested.

18. A term for years was assigned to trustees, in trust for husband and wife, during their lives, and the life of the longer liver of them; and if there should happen to be issue male of their bodies living at the time of the decease of the survivor of them, then in trust that the eldest son of that marriage should be maintained out of the rents and profits, until he attained his age of twenty-one years, and then the whole term to be assigned to him; and in case he should die before the age of twenty-one years, then in like manner to the second, third, and every other son of that marriage; but in case there should be no such issue living at the time of the decease of the survivor of the husband and wife, or in case there should be such issue, and they should all die before any of them attained the age of twenty-one years, then the term was limited to Sir W. Massenburg. The husband and wife died leaving a son, who died an infant. (*c*)

Lord Keeper North said, that as the rules of Chancery, respect-

(*a*) Avelyn *v.* Ward, 1 Ves. 420. (*b*) [Simpson *v.* Vickers, 14 Vez. 341.]
(*c*) Massenburg *v.* Ash, 1 Vern. 234–304.

ing the limitations of trust of terms for years, were the same with those by which executory devises of terms for years were governed at law; he would have the opinion of the Judges on this point.

The Judges of the Court of Common Pleas having unanimously given their opinion, that the contingent limitation over to Sir W. Massenburg was good, because it must happen within the space of twenty-one years after a life in being, the Lord Keeper decreed accordingly. †

19. Alice Higgins devised the premises, being a term for 999 years to trustees, in trust for herself for life, remainder to H. Higgins her son, and Mary his wife, and after their several deceases, in trust for the eldest son of the said H. Higgins, by the said Mary Dowler in tail; and for default of issue of such first begotten son, for all and every the other son and sons of the said Henry Higgins, by the said Mary Dowler; and for default of such issue male of the said Henry Higgins, by the said Mary Dowler, then in trust for all and every the daughters. There never was a son of the said marriage, but there was a daughter; and the husband and wife being both dead, it was objected that *the limitation of the trust to the daughter was void, *416 it being after a limitation in tail to the sons, which, in the case of a term, was not to be allowed. (*a*)

Lord Cowper said, there was a diversity, where the limitation in tail had vested, for there, it must be admitted, the remainder over would have been void; but as in this case there never was a son, the remainder to the daughter was good. And it was no more than the limitation of the trust of a term two ways; viz. if there be a son by the marriage, then the limitation is to that son; but if there be no son of the marriage, but a daughter, then to that daughter; and this was not too remote a contingency, because confined to a life in being.

20. Dorothy Lennard being possessed of lands for the residue of a term of 500 years, devised them to a trustee, in trust to permit her nephew Francis Leigh and his assigns to receive all the rents and profits of the premises, for so long as he should live;

(*a*) Higgins *v.* Dowler, 1 P. Wms. 98. 1 Salk. 156.

[† The present mode of settling terms for years, which has been already stated tit. 32, c. 24, s. 13, is confirmed by this determination.—*Note to former edition.*]

and after his decease, to the use of his first son and the heirs male of his body; and in default thereof, to the use of his second and other sons, in the same manner; and in default of such issue, to the use of the daughter and daughters of Francis Leigh; or in case of their death before the age of twenty-one or marriage, then to the use of Edward Stanley, for the then residue of the term. (*a*)

Francis Leigh died without issue; and the question was, whether the limitation of the term to Edward Stanley was good.

Sir J. Jekyll said, he did not think this limitation tended to a perpetuity; such a limitation of an estate in fee simple would have been good; and yet that would have gone further towards a perpetuity; for the sons, though not *in esse*, must all have taken, one after another, and none of them could have barred the remainder but by a recovery, which required time; whereas in this case the first son would upon his birth have had the whole residue of the term, subject to the precedent interest, vested in him; and it could never have gone over to any remainder man, if he had died under age, but his executors or administrators should have had it, who could have aliened or assigned it immediately. It was decreed, that the limitation over was good. (*b*)

21. In the case of Stephens *v.* Stephens, the certificate of the Judges, after stating that the devise to the first son of Mary Stephens who should attain the age of twenty-one years was
417* good; *goes on in these words,—"The consequence whereof is, that all the subsequent limitations will be good: the estate will vest in Thomas, the son now living, when he shall attain the age of twenty-one years in tail male, according to the clause directing the order of succession between the sons to be born. If Thomas the son now living, should happen to die before the age of twenty-one years, and the testator's daughter, Dame Mary Stephens, should have any other son by Sir Thomas Stephens, then the estate will go over to him, when he shall attain his age of twenty-one years, in like manner as it would have vested in Thomas. If Thomas the son should die before the age of twenty-one years, and Dame Mary should have no other son by Sir Thomas Stephens, who should attain his age

(*a*) Stanley *v.* Leigh, 2 P. Wms. 686. (*b*) Tit. 32, c. 24.

of twenty-one years, then his estate will go over to Sarah the daughter, and all the other daughters of the said Dame Mary by Sir Thomas, as tenants in common in tail; with remainder over to Richard Stephens, the testator's brother, in fee. But in case Thomas the son should die before the age of twenty-one, and Sarah the daughter should then be dead, without issue, and there should be no other son of Dame Mary who should attain the age of twenty-one years, or any other daughter hereafter born of their bodies, then the estate will go to the said Sir Richard Stephens, by virtue of the last remainder to him in fee." (*a*)

22. In the foregoing cases, it is observable, that wherever a preceding executory limitation carried the whole interest, a subsequent limitation was not considered as a limitation *upon* the preceding, and to take effect after it, but as an alternative, substituted in its room, and to take effect only in case the preceding one should fail, and never take effect at all: and where a preceding executory limitation did not carry the whole interest, a subsequent one was considered either as becoming vested in interest, as a remainder expectant on the preceding estate, as soon as that took effect, or else as taking effect in possession at the time limited for the preceding estate to vest, in case that preceding one failed of taking effect. So that in either case it follows, that if the preceding limitation was not too remote in its creation, the subsequent one could not be so, being to take effect at the limited time for the first, or else not at all. It was therefore necessary to distinguish between instances of this kind, and those cases wherein either the preceding limitation is
*not executory, but vested, or there is no preceding limi- *418
tation at all; for in either of such cases, the future limitation cannot be merely an alternative, but is absolutely limited to take effect, either after the expiration of the preceding limitation, or else, if there be no preceding limitation, upon the happening of some future event; and therefore, if the expiration of that preceding limitation be of too remote a nature, the future limitation is void in its creation, and no subsequent accident can make it good; because it is not, as in the former cases, limited to take effect or fail upon the event of a contingency which

(*a*) *Ante*, c. 17, s. 21. [Forr. 228.]

must be determined, one way or other, within the period allowed by law for the vesting of an executory devise; but is limited absolutely to take effect on an event which may not happen within such a period. (*a*)

23. Thus although in the case of a devise of lands in fee to the first son of A, who shall attain the age of twenty-one, and in default of such issue, remainder to B, in fee; such a limitation would fail or take effect according as the first limitation should vest or not: yet, if a devise be to the heirs male of the body of C, and in default of such issue, remainder to D, in tail; † here if we suppose the first limitation void, the subsequent one is an absolute future limitation, to take effect after a dying without issue; and therefore though no heirs male of the body of C, should ever exist, such event will not make good the limitation to D, which was too remote in its creation, and could not be considered, as in the former case, merely as an alternative to a preceding limitation, and which must vest at the time limited for that preceding one to vest, or else not at all. (*b*)

24. It has been stated, that whenever a contingent limitation is preceded by a freehold capable of supporting it, it is construed a contingent remainder, and not an executory devise. But it is possible that the freehold so limited may, by a subsequent accident, become incapable of ever taking effect at all; as by
419* *the death of the first devisee in the testator's lifetime, in which case the subsequent limitation, if the contingency has not then happened, will be in the same condition at the testator's death, that is, at the time when the will is to take effect, as if it had been limited without a preceding freehold. Now in this case it has been held, that *where such subsequent limitation*

(*a*) Fearne, Ex. Dev. 522, Ed. 8.
(*b*) Sabbarton *v.* Sabbarton, Forrest, 245. 2 Burr. 878.

[† Upon this passage Mr. Butler in his edition of Fearne's C. R. makes the following observation: "The text in this place appears to be imperfect. The devises mentioned by Mr. Fearne, are evidently devises of real estate; and a devise of real estate to the heirs male of the body of C, is good, either with or without a previous devise to C, himself." Probably Mr. Fearne meant to propound a case where without any devise to C, or the heirs male of his body, there was a devise "after a failure of heirs male of the body of C," to D, in tail. Such a devise over has been shown to be void in the former part of this work. To such case Mr. Fearne's observations in this place, evidently apply.]

could not vest at the testator's death, it should *enure as an executory devise*, rather than fail for want of that preceding freehold, which had never taken effect. (*a*)

25. Mr. Hopkins devised his real estate to trustees and their heirs, to the use of them and their heirs, in trust for Samuel Hopkins for life; and, from and after his decease, in trust for the first and every other son of the said Samuel, and the heirs male of the body of every such son; and for want of such issue, in case John Hopkins, (the father of Samuel Hopkins,) should have any other son or sons of his body, then in trust for all and every such son and sons respectively and successively, for their respective lives, with the like remainders to their several sons, with the like remainders to the heirs male of the body of every such son, as before limited to the issue male of the said Samuel Hopkins; and for want of such issue, in trust for the first and every other son of the body of Sarah, (the said John Hopkins's eldest daughter,) lawfully to be begotten, with like remainders to the sons of John Hopkins's other daughters; and for want of such issue, then in trust for the first and every other son of his cousin Ann Dare, lawfully to be begotten, with like remainders to the heirs male of the body of every such son of the said Ann Dare; and for default of such issue, then in trust for his own right heirs forever. (*b*)

Samuel Hopkins died in the testator's lifetime, without issue; and, some time after, the testator died. Nor had John Hopkins any other son, nor were any of the other remainder-men *in esse* at the testator's death, except a son of Ann Dare.

Lord Talbot. — "Two questions have been made upon this will. The first is, whether this limitation to the first and every other son of John Hopkins can now take effect as an executory devise? Or, whether it shall be taken as a contingent remainder, and, consequently, void for want of a particular estate to support it by reason of Samuel's death in the testator's lifetime; and that John Hopkins had no son *in esse* at the testator's death, * when the remainder might vest? As to the first, *420 I think it impossible to cite any authorities in point: none have been cited. It seems to be allowed, that if things

(*a*) Fearne's Ex. Dev. 524. Ed. 8.

(*b*) Hopkins *v.* Hopkins, Forrest, 43. [Butl. note 271 (b) to Co. Lit. s. 3, 4.]

had stood as they did at the time of making the will, the limitation in question would have been a remainder, by reason of Samuel's estate, which would have supported it. So is the case of Purefoy *v.* Rogers: and limitations of this kind are never construed to be executory devises, but where they cannot take effect as remainders. (*a*) So on the other hand, it is likewise clear, that, had there been no such limitations to Samuel and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it; and, consequently, not able to enure as a remainder; so that it must be the intervening accident of Samuel's death in the testator's lifetime, upon which this point must depend. And, as to that, I am of opinion, that the time of making the will is principally to be regarded, in respect to the testator's intent. And if, in this case, we consider it as an executory devise, the intent will be served in case John Hopkins has a second son: but if it is taken as a remainder, the intent plainly appearing that a second son of John Hopkins should take, is quite destroyed, there being no precedent estate to support it as a remainder. The very being of executory devises shows a strong inclination, both in courts of law and of equity, to support the testator's intent as far as possible: and though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of a like nature that have been adjudged; and if such a construction may be made consistently with the rules of law, and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In Pay's case, had the testator lived to Michaelmas, the limitation had been a remainder. And if a remainder in its first creation does, by any subsequent accident, become an executory devise, why should it not be good here, upon the authority of that case, where, by the testator's death before Michaelmas, what would otherwise have been a remainder, was held to be good by way of executory devise. I think that, in this case, the limitation would operate as an executory devise, if it was of a legal estate; and therefore shall do so as a trust, the rules being the same." (*b*)

421* *26. Soon after the above decree was made, John Hop-

(*a*) *Ante*, c. 18, s. 8.

(*b*) *Ante*, c. 18.

kins had issue William Hopkins, a second son; upon which it was held, that the executory devise having thereby once vested, the subsequent limitations thereupon became contingent remainders. And though such son afterwards died before the subsequent limitations vested, yet were they not destroyed; because it was held that the inheritance vested in the trustees was as sufficient to support them, as if there had been estates limited for that particular purpose. (*a*)

27. In the case of Stephens *v.* Stephens it was held, that till the estate became vested in some one of the testator's grandsons, who attained twenty-one, the limitations over, to the daughters of his daughters, must have been executory devises. But as soon as ever the estate should become vested in a son, then those subsequent limitations must of course take effect as vested remainders, upon the preceding estate tail in such son. (*b*)

28. [In a recent case the devise was to the testator's daughter Elizabeth, the wife of William Harris, for life, and in case her husband should survive her, to him for life, and after the death of the survivor to the testator's grandson John Harris, son of his said daughter, his heirs and assigns forever; but in case he should die before the testator's daughter, and she should have no other child living at her death, then his will was that his daughter should give and devise the said premises to such person or persons as she should think proper. The testator died in February, 1763, and his grandson John, the following April. In January, 1766, the daughter had another son William. In 1770, her husband William Harris, died: and in Hilary Term, 1773, Elizabeth Harris, who was the testator's heir, having married again, concurred with her husband in levying a fine with proclamations. Upon her death (a widow) William Harris, the lessor of the plaintiff, her son and heir, entered to avoid the fine: the question was, whether he was barred by the fine; which depended upon the construction of the devise, "that in case John should die in Elizabeth's lifetime, and she should have no other child living at her decease, she should devise the premises to such persons as she should think proper;" if this was to be construed an executory devise, at the time the fine was levied, it would not be barred, but if a contingent remainder, then the

(*a*) 1 Ves. 269. 1 Atk. 581. (*b*) *Ante*, c. 17. Brownsword *v.* Edwards, *ante*, § 6.

lessor of the plaintiff was barred. Mr. Justice Bailey, in de-
422* livering * an elaborate opinion, cited among other authorities Stephens *v.* Stephens, Forr. 228; Fearne, 519; Hopkins *v.* Hopkins, *ubi sup.*, and concluded with the following observation: "From these authorities we think it clear, that a change of circumstances after the death of the testator, may convert into a remainder, what, at the death of the testator, and without such change, could only have operated by way of executory devise, and that this will be the case where that limitation which alone would make the others executory devises, is become incapable of taking effect; and if this be so, this case is clear. For at the time this fine was levied, the only vested estate was in Elizabeth the testator's daughter, and her husband in her right, and the only other interest was a contingent remainder in favor of any child or children she should leave at her death, and that remainder the fine destroyed.] (*a*)

29. But when a preceding freehold has once vested, Mr. Fearne says, no subsequent accident will make a contingent remainder enure as an executory devise. This being a direct consequence of the rule above stated, that wherever a devise may be construed a contingent remainder, it shall never be considered as an executory devise. (*b*)

30. It has been held, that where an executory devise is *limited per verba de præsenti*, that is, where the devisee is mentioned as a person *in present existence*, and the commencement of the estate devised is not expressly deferred to a future period; there the devisee must be a person capable at the death of the devisor, otherwise the devise will be void. As if one devise immediately to the heir of J. S., and J. S. is *living at the death of the testator;* it is said that the devise shall not be construed an executory devise, and therefore must be *void;* but if it were *to the heir of J. S., after the death of J. S.*, that would be clearly *good* as an executory devise, because a future time is mentioned. (*c*)

31. So, it has been said, that a devise to the first son of A, he having no son at the time, is void; but if it were to the first son of A when he shall have one, it will be good. Though Lord

(*a*) [Doe *v.* Howell, 10 B. & Ald. 191.]
(*b*) Fearne, Ex. Dev. 526. Ed. 8. *Ante*, c. 17, § 11. (*Supra*, § 1, note.)
(*c*) 1 Salk. 226.

Ch. J. Bridgeman said, that a devise to J. S. for fifteen years, remainder to the right heirs of J. D., is not good; but that a devise to one for fifteen years, remainder to the first son of J. D. is good; because the devisor takes notice that A has no son, and intends a future act. (*a*)

*32. It has been already stated, that a devise to an infant *423 *in ventre matris* is good; and in the case of Gulliver *v.* Wickett, the Court held, that the limitation to the child of which the wife was supposed to be *ensient*, if there had been no devise to the wife for life, being *in futuro*, would have been a good executory devise. (*b*)

33. In the case of Chapman *v.* Blisset, Lord Talbot held, that the devise to the unborn children of the testator's grandson, though made *per verba de præsenti*, should take effect as an executory devise, the intention being clearly future. (*c*)

34. Mr. Fearne concludes his observations on this subject by saying, that whatever force is to be allowed to the distinction between executory limitations *per verba de præsenti* and *per verba de futuro*, it can only affect those cases where there is not the least circumstance from which to collect the testator's contemplation or intention of any thing else than an immediate devise, to take effect *in præsenti*. (*d*)

35. Where there is an executory devise of an estate of inheritance, and the *freehold* is *not* in the mean time *disposed of*, it *descends to the heir at law of the testator.*

36. Thus in Pay's case, which has been already stated, it was held, that the freehold and inheritance of the lands devised, descended to the heir at law. So in Clarke *v.* Smith, the estate was held to have descended to the heir of the testator, and continued in him for six months. (*e*)

37. In the case of Gore *v.* Gore, Lord Hardwicke and the other Judges of the Court of K. B., to whom the case was secondly referred by the Court of Chancery, certified that the executory devise was good, "and that the freehold of the said manors, on the death of the devisor, vested in his heir at law." (*f*)

(*a*) Id. 229. T. Raym. 83.
(*b*) *Ante*, c. 18, s. 4. *Ante*, s. 15.
(*c*) Doe *v.* Carleton, 1 Wils. R. 225. Harris *v.* Barnes, 4 Burr. 2157.
(*d*) Fearne, Ex. Dev. 536, Ed. 8. (*e*) *Ante*, c. 18, s. 2. Idem.
(*f*) *Ante*, c. 18, s. 15. [Doe *v.* Timins, 1 Bar. & Ald. 530.]

38. Where there is a preceding estate limited, within an executory devise over of the real estate, the *intermediate profits*, between the determination of the first estate, and the vesting of the limitation over, will *go to the heir at law*, if not otherwise disposed of.

39. Thus, in the case of Hopkins *v.* Hopkins, it was decreed that till John Hopkins had a son, the rents and profits should go to the heir at law of the testator; and afterwards a son being born to John Hopkins, upon the death of that son, it was
424* decreed *that the rents and profits should belong to the heir, till some other person should become entitled under the limitations in the will. (*a*)

40. A testator devised his real estate to trustees, and willed that the first son of John Stones, when he came to twenty-one, should have it, and his heirs forever; and that he should be well educated. John Stones had no son when the testator died. (*b*)

Lord Hardwicke said, this was a good executory devise to the first son of John Stones, when he attained twenty-one; and as to the rents and profits in the mean time, where there was an executory devise, whether of a legal or trust estate, the rents and profits went to the heir at law; because the legal estate in the one case, or the trust in the other, descended in the mean time to the heir at law. But this intermediate interest, or benefit arising to the heir at law, would determine when John Stones had a son, for that son's education must come out of the rents and profits. (*c*)[1]

41. A *devise of all the rest and residue* of the real estate will however pass, as well the *profits* from the testator's death to the time of the estate's vesting, as those from the determination of the first estate, to the vesting of the subsequent one.

42. Thus, in the case of Stephens *v.* Stephens, it was deter-

(*a*) *Ante*, s. 25.
(*b*) Bullock *v.* Stones, 2 Vez. 521.
(*c*) [Duffield *v.* Duffield, 1 Dow, P. C. New Ser. 268. Phipps *v.* Williams, 5 Sim. 44.]

[1] Upon a devise of all the residue of his estate to the testator's son, when he should attain the age of twenty-three years, it was held, that the heir at law, in the intermediate time, took the estate; that the rents and profits would, in the mean time, accumulate in his hands, in trust for the devisee; but that the Court would, in a proper case, appoint a receiver. Rogers *v.* Ross, 4 Johns. Ch. 388; and see Genery *v.* Fitzgerald, Jac. 468.

mined, with the advice of the Judges, that the intermediate profits passed to Sir R. Stephens, by force of the residuary devise, as an interest in the real estate not otherwise disposed of. (*a*)

43. A testator devised all the rest and residue of his real and personal estate, of what nature or kind soever, to such child or children as his daughter should have. (*b*)

It was held, that the profits, from the testator's death to the birth of a child of his daughter, should pass under this devise. (*c*)

44. It was formerly held, that contingent estates in freehold property, were not devisable; but it has been already stated, that the law is now altered in that respect; and therefore *executory estates*, as also *possibilities accompanied with an interest* which would be descendible to the heir of the object of them, dying before the contingent event on which the vesting of the estate depended, *are devisable.* (*d*)

*45. Executory interests, in terms for years, were always held to be devisable. *425

46. A person possessed of a term for years in lands devised the same, after his wife's death, to his son. The son made his will, and thereby gave the lands devised to him by his father's will to the plaintiffs, and died in his mother's lifetime. (*e*)

The Lord Keeper decreed the lands to be enjoyed by the plaintiffs, according to the will of the son.

47. A devised a term for years to B for life, remainder to C, who, in the lifetime of B, disposed of this remainder by will. (*f*)

It was decreed, that the bequest was good; and amounted to C's declaring by his will that his executor should stand possessed of the term, in trust for the devisee.

48. At common law, a possibility was held not to be assignable, although in certain cases it might be released. But the Court of Chancery has, in many instances, determined that *a possibility of a term for years is assignable.* (*g*)

49. A person possessed of a term for 1000 years bequeathed it to B for fifty years, if he should so long live, and after his decease

(*a*) *Ante*, c. 17, s. 21.
(*b*) Rogers *v.* Gibson, 1 Vez. 485. (Brailsford *v.* Heyward, 2 Desaus. 18.)
(*c*) Gale *v.* Gale, 2 Cox, R. 136.
(*d*) *Ante*, c. 3, ss. 23, 24, and note. [Scawen *v.* Blunt, 7 Ves. 294.]
(*e*) Veizy *v.* Pinwell, Pollexf. 44. (*f*) Wind *v.* Jekyl, 1 P. Wms. 572. (*g*) [3 T. R. 93.]

to C, and died. C assigned it to D during the life of B; and this assignment was held good. (*a*)

50. A person devised a term for years to his wife for life, remainder to his son and daughter. The daughter and her husband, in the lifetime of the wife, assigned over their moiety, and after the death of their brother they assigned over the other moiety, the mother being still alive. (*b*)

This assignment was established by the Court of Chancery, and also by the House of Lords.

51. *Executory interests* or *possibilities* in freehold estates, may be *passed at law* by deed, fine, and common recovery, *by way of estoppel;* and they may also be *released* in certain cases. (*c*) †

426* *52. An *executory interest*, whether in estates of inheritance, or in terms for years, is *descendible* and *transmissible to the heirs or executors of the devisee* thereof, where such devisee dies before the contingency happens; and if not disposed of before, will vest in such heirs or executors, when the contingency happens.

53. A testator devised to A and his heirs, and if he died be-

(*a*) Kimpland *v.* Courtney, 2 Freem. 250.

(*b*) Theobald *v.* Duffay, 2 P. Wms. 608. [9 Mod. 101.] *Vide* Wright *v.* Wright, 1 Vez. 409.

(*c*) Might before stat. 3 & 4 Will. 4, c. 74, be passed by fine or recovery, and may now be released.

[† Now, as regards lands in Ireland, by the stat. 4 & 5 Will. 4, c. 92, s. 22, persons not being expectant heirs (general or special) are empowered to dispose of contingent estates and interests by any assurance, whether deed or will, or any other instrument by which they could have made such disposition of the estate, if vested in possession. The clause effects a very important alteration in the law of real property in Ireland; the English Act 3 & 4 W. 4, c. 74, has no such clause. The act, by abolishing fines and recoveries, took away the remedy by estoppel, which, in many important instances, was effected through the medium of those modes of assurance; but the section in question gives more than an equivalent; for before the act, contingent estates could not be transferred *at law* by deed; and by fine and recovery were rather bound or extinguished, by estoppel, than conveyed: but now, by virtue of this provision, the owner of a contingent or executory estate or interest, may convey it at law, and not as heretofore merely bind it in equity, by contract. Before the above enactment, only those contingent interests could be devised in which the person was ascertained; Fearne, C. R. 370; 1 Roe *v.* Jones, 1 H. Bl. 30, sup. ch. 3, s. 26; and not where the person was not ascertained. Doe *v.* Tomkinson, 2 M. & S. 165, sup. ch. 3, note to s. 24. But the clause in question authorizes the devise of both classes of contingent estates and interests.]

fore twenty-one, then to B and his heirs. A died before twenty-one, but B died before him. The question was, whether B's heirs should take. And the Court clearly held, that though B died in the lifetime of A, yet his heirs might well take under the executory devise; for that such a devise was not to be considered as a mere possibility, but as an interest of the same nature as a contingent remainder, and consequently transmissible. (*a*)

54. George Paynter devised freehold and copyhold messuages to his son George Paynter, his heirs and assigns forever; but if he should happen to die before he attained his age of twenty-one years, leaving no issue living at the time of his death, then he devised the same premises to his mother Catherine Paynter, her heirs and assigns forever. After the decease of the testator, his mother Catherine Paynter died, in the lifetime of George Paynter the son, who afterwards died under age, and without issue. (*b*)

The question was, whether this executory devise descended to the heir of Catherine Paynter. And it was determined, that the lands vested in the heir at law of Catherine Paynter, upon *the happening of the contingency, viz. upon the *427 decease of George Paynter under age, and without issue. †

55. In cases of contingent or executory interests, the *Court of Chancery will interfere*, on behalf of those who are entitled to such interests, *to prevent* malicious and unreasonable *waste* being committed by the persons in possession.

56. Robinson Lytton devised all his estates, out of settlement, to the defendant, his only son, and to his heirs and assigns forever. And, in case his said son should not live to attain the age of twenty-one years, leaving no issue by him lawfully begotten, then and in such case he gave his said estate to his first and every other daughter in tail. And he further directed, that in case his said son should attain the age of twenty-one, his estates

(*a*) Gurnel *v.* Wood, 8 Vin. Ab. 112. Willes, R. 211.

(*b*) Goodright *v.* Searle, 2 Wils. R. 29. Scott *v.* Scott, *ante*, v. 8. [Doe *v.* Hutton, 3 Bos. & P. 643.]

[† This case has been confirmed by recent judgments of the Courts of C. B. and K. B. Goodtitle *v.* White, 2 N. R. 383, and 15 East, 174.—*Note to former edition.*]

in London, Sussex, &c. should be sold; and the moneys arising from such sales he gave to all his daughters, the plaintiffs, in equal proportions, as an addition to their fortunes; and in case one or more of his said daughters should die, then her share to go to the survivors. (*a*)

The testator died in 1732, and the defendant, his son, being still under age, and going to cut down timber, the plaintiffs brought their bill for an injunction to stay the defendant from felling timber, as contrary to their father's will, who intended them the whole benefit of the estates in question, in case his son should attain twenty-one.

For the defendant it was insisted, that by the express words of the will he had the fee in him, which could be devested only upon a contingency that might never happen; and that the Court would not restrain a person, having the inheritance, from committing waste. That it was unreasonable to put a man in a worse state, with regard to his own interest, because after his own interest determined, he had one for a third person, and cited Savil *v.* Savil.

Lord Hardwicke.—"If the defendant has a legal right to cut down timber, and there be no equitable circumstances in the case, he ought not to be restrained from the exercise of this right; but if there be any such, he ought. I did not think fit to deter-
428* mine the matter upon a petition, but thought it proper *for a bill. As to the testator's intent, he never meant that his son should, before he attained twenty-one, fell all the timber on these estates, which were devised to be sold, for the increasing his daughter's portions; and it might happen that the value of the timber, when felled, would equal, or perhaps exceed that of the land; and his meaning must have been to give it of the same value it was at his death; which must be the same timber that was on it at that time. Suppose the greatest part of this estate were meadow ground, and the defendant was going to plough it, by which he would greatly increase his present profits, but reduce the value of the land, by turning it into arable; would not the Court in such case grant an injunction? Certainly it would. The testator has given his son these estates only for a time, during which, in supposition of law, no waste will be com-

(*a*) Robinson *v.* Lytton, MSS. Rep. 3 Atk. 209.

mitted; that is, till the defendant attains twenty-one. For what guardian could cut down timber, and by that means turn part of the inheritance into personal estate? and this is a very material circumstance with regard to the testator's intent. The next consideration is, what are the words of this will, which, putting the two clauses together, amount to a gift of all his estates, which he had power over, to his son forever; and that in case his son shall attain twenty-one, then that the estates shall be sold, and the moneys arising therefrom he gives to his daughters, by way of augmentation of their portions. Upon which it was said, by the plaintiff's counsel, that the defendant is to be considered as a trustee of the inheritance, for the benefit of his sisters; and I am of opinion he is so, taking the profits to his own use until he attains twenty-one. This Court has gone greater lengths in granting injunctions to stay waste than the courts of law have in granting prohibitions against waste; as where there has been an interposing estate for life, remainder in fee, in which case no action of waste lies, during the continuance of the mesne remainder. 1 Inst. 54. And injunctions have been granted to the remainder-man, notwithstanding the interposing estate for life. So, where there has been tenant for life, remainder for life, without impeachment of waste, remainder in fee, the Court has restrained the remainder-man for life, during the continuance of the first estate for life, because of the possibility of his dying before the first tenant for life. The like in mortgages, where a mortgagor has been in possession, the * Court has restrained him from cutting down timber, *429 without inquiring whether the estate itself was sufficient to answer. Now this is much stronger in the case of a trustee; and here it is the same as if he had said 'I give this estate to my son and his heirs, to the intent he may receive the profits till twenty-one; and after twenty-one, then to be sold for my daughters' portions.' In which case the Court would certainly have restrained the defendant. (*a*)

"There are three kinds of interest taken notice of in this Court—the legal estate at common law; the use, which now, by 27 Hen. VIII. draws the legal estate to it; and the beneficial interest. Now, how does it stand upon this devise? The legal

(*a*) Tit. 3, c. 2. Tit. 15, c. 2.

interest is in the defendant; and as to the beneficial interest, that belongs to him till twenty-one, and then the whole is a trust for the benefit of other persons. If he does not attain twenty-one, and leaves no issue, the estates go according to the several remainders limited thereon: if he does, they are to be sold for augmentation of the daughters' fortunes. It would, therefore, be unreasonable to suffer him to take away a considerable part of the value of estates intended for daughters' portions: nor will the Court enter into the value of these portions, nor of the proportion they bear to the son's estate; the father being the proper judge of the division of his property in his family.

"Several cases have been put upon waste, which have never been determined; only the Court *arguendo* has said it would do so or so. As that of an infant in *ventre sa mere*, where the estate descends in the mean time to the next heir. It has been said several times that the Court would grant an injunction to restrain the heir from waste; and I should certainly do it. So, in such executory devises as must take place within a reasonable compass, as in Gore *v.* Gore, where the freehold descends in the mean time, I doubt whether such an heir should be permitted to commit waste, and think he ought to be restrained. This injunction, therefore, must be made perpetual, there being no other way to preserve the benefit which the testator intended his daughters, but without costs on either side." (*a*)

57. It was determined in the following modern case after very great deliberation, that a *testator might direct the rents and profits* of an estate whereof an executory devise was made, *to accumulate till the time when such estate became vested;* and
430* *that the doctrine established in the preceding cases, respecting the period within which they must vest, was *applicable to a trust of accumulation.*

58. Peter Thellusson being seised of considerable real estates, and of a very large personal estate, and having three sons, Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, devised all his manors, messuages, lands, tenements, and hereditaments to trustees, their heirs and assigns forever, upon the trusts thereinafter mentioned; and as to the residue of his personal estate, he gave and bequeathed the same to the

(*a*) *Ante*, c. 18, s. 15.

same trustees, their executors, administrators, and assigns, upon trust that they should, as soon as conveniently might be after his decease, invest the same in the purchase of freehold estates of inheritance, upon the trusts thereinafter mentioned. And he directed that his trustees, their heirs and assigns, should stand seised of the real estate devised to them, and of the estates directed to be purchased, upon trust to receive the rents and profits of them during the natural lives of his sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and his grandson John Thellusson, son of his said son Peter Isaac Thellusson, and of such other sons as his said son Peter Thellusson then had or might have, and of such issue as his said grandson John Thellusson might have, and of such issue as any other son of his said son Peter Isaac Thellusson might have, and of such sons as his said sons George Woodford Thellusson and Charles Thellusson might have, and of such issue as such sons might have, as should be living at the time of his decease, *or born within due time afterwards*, and during the natural lives and life of the survivors and survivor of the several persons aforesaid. The testator then directed, that his trustees should from time to time invest the money to arise from such rents and profits in such purchases as he had therein before directed to be made with his personal estate; and that they should from time to time collect, receive, lay out, and invest the rents and profits of those estates in the same manner. And he directed his trustees from time to time to cut such timber on the estate devised and to be purchased, as should be fit to be cut, and to sell the same; and to invest the money arising by such sales in such purchases as were therein before directed to be made; and he empowered the trustees to make leases, and generally to act in *the management of the trust estates, as if they *431 were their own. He then directed, that after the decease of the several persons during whose lives the rents and profits of the estates devised and to be purchased were directed to accumulate, an equal partition should be made by the trustees of the estates; and that the whole thereof should be divided into three lots of equal value; and he then directed the manner in which those lots should be limited; which, as to the first of the lots, is expressed in the following words:—"I do hereby direct that the

premises contained in one of such allotments, shall be conveyed to the use of the eldest male lineal descendant then living (and who shall be entitled to the first choice of such allotments) of my said son Peter Isaac Thellusson in tail male, with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited, of my said son Peter Isaac Thellusson, successively in tail male; with remainders, in equal moieties, to the eldest and every other male lineal descendant or descendants then living of my said sons George Woodford Thellusson and Charles Thellusson, as tenants in common in tail male, in the same manner as herein before directed with respect to the eldest and every other male lineal descendant or descendants of my said son Peter Isaac Thellusson, with cross remainders between or among such male lineal descendants as aforesaid of my said sons George Woodford Thellusson and Charles Thellusson, in tail male; or in case there shall be but one such male lineal descendant, then to such one in tail male, with remainder to the use of them the said Matthew Woodford, James Stanley, and Emperor John Alexander Woodford, their heirs and assigns forever, upon the trusts, and to and for the intents and purposes herein after mentioned, expressed, and declared of and concerning the same." (*a*)

He then directed the estates, included in one other of such allotments, to be conveyed to the use of the eldest male lineal descendant then living (and who was to have the second choice of such allotments) of his son George Woodford Thellusson in tail male; with similar remainders to the second, third, fourth, and every other male lineal descendant or descendants of the said George Woodford Thellusson successively in tail
432* male; and * with similar remainders, in equal moieties, to the eldest and every other male lineal descendant or descendants then living of the said Peter Isaac Thellusson and Charles Thellusson, as tenants in common in tail male, with similar cross remainders; and with the ultimate remainder in the same manner, to the use of the trustees in fee-simple, upon the trusts therein after mentioned.

(*a*) Thellusson *v.* Woodford, 4 Ves. 227.

He then directed the estates, included in the remaining lot, to be conveyed to the use of the eldest male lineal descendant then living of his said son Charles Thellusson in tail male, with similar remainders to the second, third, fourth, and every other male lineal descendant or descendants then living of his said son Charles Thellusson, successively in tail mail; with remainders, in equal moieties to the eldest and every other male lineal descendant or descendants then living of the said Peter Isaac Thellusson and George Woodford Thellusson, as tenants in common in tail male, with similar cross remainders; and with the ultimate remainder in the same manner to the use of the trustees in fee simple, upon the trusts therein after mentioned.

And he directed, that the trustees, their heirs or assigns, should stand and be seised of the estates by him devised and so to be purchased as aforesaid, upon failure of male lineal descendants of his said sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson as aforesaid, in trust to sell all the said estates, and to pay the money to arise from the said sales unto his Majesty, his heirs and successors, kings and queens of England, to be applied to the use of the sinking fund, in such manner as should be directed by act of Parliament.

The testator died in 1797, leaving his said three sons; the eldest of whom had then three sons and two daughters; the second two daughters, and the third one son; and the wife of the eldest son was then with child, and was soon after delivered of twin sons.

Some time after the decease of the said Peter Thellusson, two suits were instituted in Chancery, respecting his will; one of them was upon a bill, filed by his widow and children against the acting trustees and executors of his will, and against the two sons of the said Peter Isaac Thellusson, born after the testator's decease, and also against his Majesty's Attorney-General, * praying to have the trusts of the will declared * 433
void, and the real estate conveyed to the said Peter Isaac Thellusson, as heir at law of the testator, and the personal estate divided among the plaintiffs, according to the Statutes of Distribution. The other of the suits was instituted upon a bill filed by the acting trustees and executors of the will of the said Peter Thellusson, against all the other persons, who were parties to the

first suit, praying to have the trusts of the will established and carried into execution, and the necessary directions to be given for that purpose. Both the original cause, and the cross cause, came on before Lord Loughborough, in Lincoln's Inn Hall, in December, 1798, assisted by the Master of the Rolls, (Sir R. P. Arden,) Mr. Justice Buller, and Mr. Justice Lawrence, and was argued at great length. † And on the 19th of February following, he pronounced his decree in both causes, and thereby dismissed the bill in the original cause, so far as it prayed that the limitations and dispositions contained in the will of the said Peter Thellusson of and concerning his real estates, and the general residue of the personal estate, and the rents, issues, and profits of such estates, and concerning the estates directed to be purchased, and the rents and profits thereof, and the trusts thereof, might be declared void; and declared in the cross cause, that the will ought to be established, and the trusts of it performed and carried into execution; and declared the devises and limitations of the estates contained in the will to be good and valid in the law, and gave directions accordingly.

From this decree, the three sons of Mr. Thellusson, the testator, appealed to the House of Lords: (*a*) and on their behalf it was contended, that the trust attempted to be created by Mr. Thellusson's will, being of the class of executory trusts created by will, must depend for its validity on its being instituted for those purposes, and limited within those boundaries, which the law prescribes for trusts of that description; but it was neither instituted for those purposes, nor limited within those boundaries.

I. It was not instituted for the purpose which the law prescribes for those trusts. The nature of it was, to create an equitable estate of inheritance commencing at a future time, without limiting an intermediate equitable estate com-
434* mensurate *with the interval. By the old law, limitations of this kind were illegal. For the purposes of enabling parties to provide for those reasonable occasions of

(*a*) [11 Ves. 112.]

[† Mr. Hargrave's argument has been published by himself, to which the reader is therefore referred.—*Note to former edition.*]

families which could not be provided for, except by allowing future estates of freehold to be limited without a limitation of such a previous intermediate estate, they were first admitted into wills: and afterwards, when uses were introduced, the uses raised by them were admitted among those, which, on account of the fairness and utility of their object, courts of equity thought binding on the consciences of trustees, and the performance of which they would, on that ground, compel by a subpœna. Thus, the circumstance of their being created for the meritorious purpose of providing for the reasonable occasions of families, was the ground on which the uses, raised by these limitations, were admitted among those which courts of equity would execute; and, of course, when they were not created for a purpose of that nature, the ground for the interference of courts of equity did not arise. In the present case there was no such ground. Mr. Thellusson's will was morally vicious, as it was a contrivance of a parent to exclude every one of his children from the enjoyment, even of the produce of his property, during almost a century; and it was politically injurious, as, during the whole of that period, it made an immense property unproductive, both to individuals and the community at large; and by the time when the accumulation shall end, it will have created a fund, the revenue of which would be greater than the civil list, and would therefore give its possessor the means of disturbing the whole economy of the country. The probable amount of the accumulated fund, in the events which happened, was stated in the appellant's bill, and admitted in the answer, to be £19,000,000; and, in case any of the persons answering the description of heir male, when the period of suspense ended, should be a minor, and his minority should continue ten years, it would increase the amount of that third to the sum of £10,802,373; so that if the whole property should centre in one person, and that person should have a minority of ten years after the end of the period of suspense, (a circumstance by no means improbable, particularly as Mr. George Woodford Thellusson had been long married and had no son,) the whole accumulated fund would amount to £32,407,120.

II. The trust was not confined within that boundary which *the law prescribes for trusts of this description, *435 even though it should be admitted that all the lives,

during which the accumulation was to be carried on, were in existence at the time of Mr. Thellusson's decease, as one circumstance, which materially affected the period of suspense, and which entered into every case in which the suspense of property had been held legal, did not enter into the present case.

In examining the cases decided on limitations of this kind, it would appear, that in every one of them, all the lives during which the suspense was directed to be carried on, were evidently the lives of persons immediately connected with, or immediately leading to, the person with whom, under the trust first limited to take effect at the end of the suspense, the property was to vest. Thus, (to instance two cases in which the accumulation was supposed to have been furthest carried on,) in that on Lady Dennison's will, (*a*) Miss Midgley, during whose life the property might be in suspense, was the mother of the second son to whom the property was devised. And in Long *v.* Blackall, (*b*) the testator's posthumous son was immediate ancestor to the heir in whom the property was directed to vest; but, in the present case, not one of the first lives had an immediate connection with, or immediately led to, the person benefited. In the sense here spoken of, the life of any stranger was equally connected with and would equally lead to "the respective male descendant of the testator's son," as the lives assigned by him for the period of suspense. A material difference, therefore, in a point considerably influencing the purpose and boundary of the suspense, existed between the present and all the decided cases.

III. The use made by Mr. Thellusson of the rule allowing a suspense of property to be carried on for any number of lives in being, was a fraud on the rule. It was a maxim of law, which admitted of no exception, that nothing should be effected by indirect means which could not be done in a direct manner. Now a possible suspense of property for twenty-five years was held to be void in Sir John Lade's case; (*c*) and, in the late case of Proctor *v.* the Bishop of Bath and Wells, (*d*) the Court of Common Pleas unanimously decided against the legality of a possible suspense of property for twenty-four years. Where property was suspended through the medium of lives, if the lives were those

(*a*) In the Register's Book, under the title of Harrison *v.* Harrison, 21st July, 1786.
(*b*) 7 Term R. 100. (*c*) Lade *v.* Holford, Amb. 479. 3 Burr. 1416.
(*d*) Proctor *v.* Ep. Bath and Wells, 2 H. Black. 358.

of persons connected with the ultimate owner, the persons whose *lives formed the period of suspense, would gener- *436
ally be the parents of the party ultimately benefited, and would not therefore be more than one or two lives at the utmost. Now the probable duration of one or two such lives falls short of twenty-one years; but, if an unlimited number of lives were taken, they would reach a century. It was observable, that the probable duration of the lives assumed by Mr. Thellusson reached seventy years. Thus, therefore, if the rule were taken to extend to any number of lives, it would follow, that though, where a number of years directly constituted the term of suspense, property could not be prevented from vesting absolutely during twenty-five years, according to the determination in Sir John Lade's case, or during twenty-four years, according to the case of Proctor *v.* The Bishop of Bath and Wells; yet, by assigning for the period of suspense a number of lives, whose average duration would be equal to a given number of years, and thus indirectly making years, not lives, to constitute the period of suspense, property might be suspended for a whole century; and the present would be cited, on future occasions, as a case in point for extending the period of suspense to seventy years. Thus, Mr. Thellusson's will was a fraud on the rule. When, in the Duke of Norfolk's case, (*a*) Lord Nottingham pronounced for the legality of an executory limitation, which kept the absolute ownership of a term for years in suspense for one whole life, and thereby extended the period allowed for the suspense of a term beyond what had been settled for it in the preceding case of Child *v.* Baylie, (*b*) the possibility of the abuse of that extension of executory limitation was strongly pressed upon him: and he answered it in these remarkable words: "It has been urged at the bar, Where will you stop, if you do not stop at Child *v.* Baylie's case? I answer, I will stop everywhere, where any inconvenience appears; nowhere before. It is not yet resolved what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare what are the utmost bounds to a springing trust of a term: whenever the bounds of reason or convenience are exceeded, the law will be quickly known."

(*a*) Duke of Norfolk's case, 3 Ch. Ca. 1, 14. 2 Rep. in Cha. 229. 2 Free. 72. 80 Pal. 223, and Ld. Nottingham's MSS. Rep. in Mr. Hargrave's possession.

(*b*) Cro. Jac. 459. 1 Roll. Ab. 611. Palm. 48, 333.

The use made by Mr. Thellusson of the will is, both in a private and public view, unreasonable and inconvenient; and it is
437* still more objectionable, as, by carrying on indirectly *an accumulation for seventy years, which directly could not be carried on for one third of such a number of years, it was a fraud upon the rule itself. Thus, therefore, the time pointed at by Lord Nottingham was come; and it was necessary that it should be known, that the rule was to be understood with this limitation, that whenever, from the number and quality of the lives chosen, it is evident that accumulation, and not a family purpose, was the object of the trust, the bounds of the reason and convenience of the rule were exceeded, and a fraud has been practised on the rule. It was objected to this conclusion, that any inquiry into the reasonableness, convenience, or fairness of the use made of the rule, must lead to uncertainty, and to an exercise of discretion which the Bench has always disclaimed: but this did not always follow. As much uncertainty, and as great an exercise of discretion, attends all decisions upon unconscionable contracts, as will attend decisions on the reasonableness, convenience, and fairness of the use made of the rule in question. A contract might be objectionable for its unreasonableness and unfairness, without being objectionable on the ground of either to such a degree as will induce a court of equity to rescind it; but still there is a degree in which equity will interfere. "To set aside a conveyance, there must," as Lord Thurlow said, in the case of Gwynne *v.* Heaton, (*a*) "be an inequality so strong and so complete, that it must be impossible to state it to a man of common sense, without producing an exclamation of the inequality of it." So, in respect to the rule in question, it may be much abused, without a court's being justified in taking notice of the abuse: but when the abuse is so strong, gross, and complete, that every man of common sense, to whom it was stated, must exclaim against it, the case supposed by Lord Nottingham was come, and equity would interfere to set it aside. That the rule had been strongly, grossly, and completely abused in the present case, appeared not to be doubted.

IV. The trust was not limited within those boundaries which the law requires for trusts of this description, because the will

(*a*) 1 Bro. Cha. Ca. 1.

attempts to protract the accumulation during the lives of persons unborn at the time of the testator's decease; the testator having selected for that purpose, the lives of such persons as *might not be born "till within due time after *438 his decease;" and the persons thus described could not be considered as persons actually born in his lifetime.

It was true, that for some purposes, as at the common law, to take by descent, and by the 10 & 11 W. III. c. 16, to take by way of remainder, a child, who is *in ventre sa mere*, when the estate designed for him would devolve upon him if he were born, becomes entitled to it after he is born, and may then enter upon it, and devest it from the first taker. But his title to enter upon the estate, after his birth, was not a consequence of his supposed existence during the time he was *in ventre sa mere:* but because, in the case of his taking by descent, the law, at the instant of his birth, invests him, though a posthumous child, with the character of heir, and, consequently, with all the rights of heirship; and because, when he claims by way of remainder, it is expressly provided by the 10 & 11 W. III. c. 16, that the remainder shall vest in him upon his birth. If the law considered him to exist before his birth, the freehold, during the time of his being *in ventre sa mere*, would be vested in him in the eye of the law, and for the purposes of law; but that clearly was not the case. For while he was *in ventre sa mere*, the law vested the freehold in the intermediate taker as heir, with every right and burthen of heirship; so that, after the birth of the nearer heir, he even retained the profits of the estates against him. That class, therefore, of lives, which was now the subject of observation, neither had nor could have an existence, either in fact or law, in the time of Mr. Thellusson. It followed that, by the admission of them into the term of suspense, the ground prescribed by law for the suspense of real property had been exceeded. No cases, the subject of which was real property, could be mentioned, in which a child *in ventre sa mere* had been held to be in existence for any purpose, except to limit the estate of the first devisee, or for the child himself, being the substituted devisee. In Bennett *v.* Honeywood, (*a*) Lord Bathurst declared that the Court had never construed a child *in ventre sa*

(*a*) Amb. 708, 712.

mere to be actually born at the time of the death of the testator, except in a case of devise to the children. Cases upon trusts of personal estates were not applicable to cases of the present description, arising on devises of real estates: for though rules of law, which require that an estate of freehold
439* should be actually vested in some person, and therefore deny a legal existence to a child *in ventre sa mere*, even for his own benefit, were in nowise applicable to trusts of personal estate. The case of Long *v.* Blackall was the only case where the lawfulness of making a child *in ventre sa mere*, a life, for the purpose of suspense, seemed to have been admitted: but that was a case of personal estate. Now, as there was no law which denied a legal existence to a child *in ventre sa mere*, where personal estate was concerned, there seemed (especially where, as in Long *v.* Blackall, it gave effect to a provision made by a parent for a child) that there was strong ground to contend that a child *in ventre sa mere* should, in the eye of the law, be supposed to exist for his own benefit, and that there should be a strong disposition in the courts to favor such an argument; but, in the present case, from the mere impossibility of supposing the freehold to be in the child while *in ventre sa mere*, the argument was wholly inadmissible.

Admitting, however, that the lives in question were, for some purposes of law, in existence in the lifetime of Mr. Thellusson, they certainly were not in existence for the use he made of them. In the cases where the nine months have been mentioned, as a period allowed for protracting the suspense of property, it was generally added that the nine months were allowed, for the sake of the child intended to be benefited by the protraction; but a single instance could not be produced where the nine months have been added for any other purpose; and perhaps an instance could not be brought where the courts have had occasion to mention the nine months, without adding at the same time that they were allowed merely for the benefit of the posthumous child. Then how does the argument stand? A posthumous child is, in fact, unborn at the testator's decease; the law allows that, when after his birth he answers the character of heir taking by descent, and also that in some cases especially provided for by act of Parliament, his being *in ventre sa mere* shall not deprive him of an

estate, to which, if actually born at the time of its devolution, he would have been entitled. To argue from this, that for all purposes, and particularly for the purposes which, as in the present case, operate to their prejudice, posthumous children should in the supposition of law, be thought in existence, was unjustifiable.

* V. In other respects, the suspense evidently extended *440 beyond the lives of persons in being at the testator's decease.

The classes of lives are described by the testator in the following words: —

(I.) " During the natural lives of my sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson."

(II.) " And of my grandson John Thellusson, son of my said son Peter Isaac Thellusson."

(III.) " And of such other sons as my said son Peter Isaac Thellusson now has or may have."

(IV.) " And of such issue as my grandson John Thellusson, son of my said son Peter Isaac Thellusson may have."

(V.) " And of such issue as any other sons of my said son Peter Isaac Thellusson may have."

(VI.) " And of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have."

(VII.) " And of such issue as such sons may have, as shall be living at the time of my decease, or born in due time afterwards."

The question was, whether all the lives mentioned in this part of the will must necessarily have been in existence in the lifetime of the testator, or whether some of them might come into existence after his decease? On the last supposition, the devise was evidently too remote. Now, unless the words in the third, fourth, fifth, sixth, and seventh members of the sentence, were restrained by the qualifying words, "*as shall be living at the time of my decease, or born within due time afterwards*," which were introduced at the end of the last member of the sentence, they manifestly extended to persons who might be born after Mr. Thellusson's decease. But the qualifying words could not, upon any principle, either of grammatical or legal construction, apply to them. In common sense, by every rule of grammar, and ac-

cording to every principle and precedent of legal construction, words of relation are always exclusively referred to the next immediate antecedent; unless such exclusive reference embarrasses the sentence. But, in the present case, the sentence will not only be embarrassed, by confining the reference in the last member of the sentence to the next immediate antecedent in that sentence, but the sentence will be embarrassed in an extreme degree, by extending the reference to any prior
441 * member of it. It * will not be embarrassed by confining the reference to the last antecedent in the last member of the sentence, for every member of the sentence will then be complete in itself; every member will have its word of relation, and an antecedent word, to which it explicitly refers: but it will be embarrassed in an extreme degree, by extending the reference to the prior members of the sentence. The restrictive words could not be applied to the first or second members of the sentence, without making them absolute nonsense: this alone leads to the conclusion, that they were not to be referred to the other members of the sentence, especially, as without them, and standing by itself, each of those members is perfect. If the restrictive words were referred to the third and fourth members of the sentence, one half of them must be omitted, or the reference would make them perfect nonsense: for the words, "*born in due time afterwards*," could never be referred to the words, "*now has;*" as it is impossible that a testator, speaking of sons living when his will is made, can describe them as sons who may be born in due time after his decease. The fifth member of the sentence was complete without the restrictive words; they did not however make nonsense of it, but then they left it altogether open to the force of the objection, as, by every rule of construction, the restrictive words, if they were applied to that member of the sentence, must be referred to the "*sons*" mentioned in it, and not to "*the issue of the sons.*" It was impossible to suppose, that a testator, of the age of sixty-four at the time he made his will, should have had it in his contemplation to provide for the event of there being in existence, at the time of his decease, a son of an unborn grandson of his body; yet to that supposition the reference of the restrictive words to the word "*issue*," in the fifth member of the sentence, necessarily led. Now, if they were

referred to the word "*sons*" the word "*issue*" was left unqualified; and then, among the lives, during which the period of suspense was to be carried on, all the issue of the sons must be reckoned, whenever such issue should be born. It was apprehended, that this was the only admissible construction; and that the legal boundary of suspense was therefore exceeded.

VI. Finally, the testator exceeded the bounds prescribed by law for the suspense of property, in the clause by which he directed the property to be vested in the funds till purchases could *be found. The proper and only legal mode *442 of declaring the trusts of these investments, for the purpose probably in the contemplation of the testator was, directing the dividends, and the annual produce of them, to be applied to the persons, and in the manner in which, if lands were actually purchased and settled, conformably to the trust, the rents of them would be applicable. This the testator did not do; but, on the contrary, directed the accumulation to be carried on till the purchases were actually made; so that the beneficial ownership of the property would be suspended, not only till all the lives, during which it was directed to accumulate, should expire, but during such further period as might elapse between the decease of the last surviving life and the completion of the last purchase.

On the other side it was contended, on behalf of his Majesty and the public, that the decree should be affirmed, for the following reasons:—

I. The only question was, whether the testator had transgressed any of those rules of law or equity which were sanctioned and established by decisions of courts of justice at the time when he made his will? That an executory devise was good which was to take effect in possession, after the determination of any number of lives of persons actually born, and after the death of a child *in ventre sa mere* (allowing for the period of gestation of such child,) was a rule which could not now be shaken, without shaking the foundation of the law. In the present case, on the determination of only nine lives, there would be a vested estate in possession; and the vesting therefore of the property in question was not postponed for a longer period than the law allowed. That there was nothing in this case which, in techni-

cal language, tended to a perpetuity. An estate might be limited to one for life, remainder to another for life, remainder to a third, and so on to twenty persons for life; nay, a settlement had, by the directions of a court of equity, been made, limiting an estate to fifty persons in being, for their successive lives, and no inconvenience had ever been apprehended from such limitations. (*a*) The rule had been laid down in plain and intelligible terms, with reference to the very circumstance of the number of lives; that it did not signify how great the number of lives was, for it was but for the life of the survivor, and therefore for the
443* life of but one person. (*b*) A *man might appoint 100 or 1000 trustees, and that the survivor should appoint a life estate, that would be within the line of a perpetuity. The Judges had never been aware of the difference between one life and twenty lives. Every executory devise was good that did not tend to make an estate unalienable beyond the period allowed by law as to legal estates, which could not be rendered unalienable beyond the time at which the remainder-man, who was not in existence at the time of the limitation of the estate, would arrive at the age of twenty-one. The Court had no criterion to judge of the inconvenience arising from restraining the alienation of property by executory devise, except by analogy to the restraint which the common law allowed to be put on the alienation of real property.

II. The notion, that an executory devise was good or bad according to the number of lives after which it was to take effect, never occurred to any Judge or lawyer until the present case; nor could such a notion be supported, unless it should be determined that a Judge was to decide upon the particular circumstances of each particular case, and that he was not to look for a general rule, but for particular instances in which the general rule had been acted upon. That in the Duke of Norfolk's case, Lord Nottingham, so far from deciding upon the principle, that executory devises must depend upon the rule of convenience or inconvenience, had positively declared, that he intended to confine executory devises and trusts within the limits of estates tail; and without any exception, he gave the same limitation to exec-

(*a*) Love *v.* Windham, Sid. Rep. 450. 3 Cha. Ca. 29.

(*b*) Humberston *v.* Humberston, 1 P. Wms. 332. Scatterwood *v.* Edge, Salk. 229. 2 Bro. Cha. Ca. 30.

utory devises, and trusted that the extent of the property, the cruelty or kindness of the disposition, could not be permitted to operate upon the decision of a court of justice. The intention of this case was clear and certain: it was consistent with the rules of law that intention could not be controlled by ideas of its fitness or unfitness, of its policy or impolicy; the intention of the testator was consistent with the settled rules of law at the time when his will was made, and therefore the will must be established.

III. The objection, that the doctrine of executory devises was not applicable to a trust of accumulation, was totally unfounded; the attention of a court of equity had been frequently directed to a trust of accumulation. (*a*) There were many cases in which accumulation had been directed by the Court, because the *testator had directed it expressly; others in which it had *444 been directed because the will contained indications of such an intention; (*b*) and others in which the attention of the Court had been so particularly called to the legality of the accumulation directed, as to fix the period, beyond which such accumulation was not to extend; the objection had never been before made, even in argument, except in the case of Lady Dennison's will, (*c*) when it was raised in argument, but without success. That it had always been considered as in the power of a testator to direct an accumulation of the rents and profits of his estates for the same period of time, during which the law allows the testator to render his estate unalienable. If that was not the period during which the trust of accumulation was to continue, what other period was to be substituted? Might the accumulation be permitted for one life, or for three lives, or for twenty? Different Judges might entertain very different opinions upon the subject; one good life might be more than equal to fifty bad lives. The rule therefore which could be neither extended nor contracted, was laid down by the law; and was, that accumulation might go on during that period of time, during which the law permitted the estate to remain unalienable: the law did not regard the quantity of property accumulated, but anxiously provided that, when accumulated, it should not remain unalienable beyond a period clearly marked out and ascertained.

(*a*) Hopkins *v.* Hopkins, Talb. Rep. 44. (*b*) Rogers *v.* Gibson, 1 Vez. 485.
(*c*) Harrison *v.* Harrison, 21st July, 1786.

IV. With respect to the objection, that a child *in ventre sa mere* was not a life in being for the purpose of suspending the absolute vesting of an estate, it was clear that such children were considered by the law as in being for a variety of purposes. They were considered as in being at the death of an intestate, in order to be entitled to take under the statute for distribution of an intestate's estates; they were capable of taking by descent estates in fee simple or in fee tail. It was admitted, that they were to be considered as in being for all purposes and in all cases for their own benefit; but it was said, that they were not considered as in being for such a purpose as the present; the whole foundation for the argument, that such children were to be considered as in being for their own benefit only, rested upon some words which some reporters of decisions have ascribed to Judges when delivering their opinions upon claims made by such children; but these words, if they were used in those cases,
445* by *no means negative the proposition, that such children were in being for all purposes; there was no reason for confining the rule; they were entitled to all the privileges of other persons, and it was reasonable they should be the means of conferring privileges upon other persons: but the law considered such children as in being, in cases in which they might be prejudiced; they might be vouched in a recovery, though such voucher was for the purpose of making them answerable over in value; they might be executors. Such a child had been considered in being for such a purpose as the present, in Long *v.* Blackall, which was a complete decision on the very point. Supposing that the case of Long *v.* Blackall had not settled the point, the words in the testator's will, "*born in due time afterwards*," afforded a principle of construction sufficient to maintain the point. Those words must mean, in construction of law, as describing that period during which persons might come *in esse*, for whose lives, according to the law, the accumulation might go forward.

V. With respect to the objection, that the words of restriction in the will, "*as shall be living at the time of my decease, or born in due time afterwards*," were according to just construction, to be confined to the last class of persons, during whose lives the accumulation was to be, and could not, according to the rules of construction, be carried back to any of the preceding

classes; it was submitted, that the clause of restriction could not be disconnected from all the descriptions of persons whose lives were specified, it was one sentence, and the qualification was applicable, and must be applied to the whole; strict grammatical construction was not the rule which governed in wills, if the intention of the testator required a different construction: and this sort of construction applied to all cases, whether the testamentary disposition were contrary to, or consistent with, what might be considered as worthy of favor; that the intention of the testator, if it were not inconsistent with the rules of law, was alone to be attended to. That it was impossible to read the clause in question, with a view to discover the real meaning of the testator, without being convinced that the testator meant to apply the restrictive words to all the members of the clause, that should require such restriction; the adding of the restriction after the enumeration of the last class of persons, was not, *because it was intended to apply to that only, but in *446 order to avoid the frequent repetition of it.

VI. As to the objection, that the testator had exceeded the bounds prescribed by law for the suspense of property, in the clause by which he directed the property to be invested in the funds, until such purchases should be found, if such objection was now to be repeated, the answer was, that such was the case in every will, where there was a direction to lay out the accumulating fund of principal and interest in lands. It was always in this way that, until the purchase could be made, the money was to be accumulated, where an accumulating fund was to be made the ground of purchase; the interest and dividends, until the purchase was made, were never directed to be paid to the person who would be entitled to the rents and profits of the lands to be purchased.

The following questions were put to the Judges:—

I. A testator, by his will, being seised in fee of the real estate therein mentioned, made the following devise:—"I give and devise all my manors, messuages, tenements, and hereditaments, at Brodsworth, in the county of York, after the death of my sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and of my grandson John Thellusson, son of my said son Peter Isaac Thellusson, and of such other sons

as my said son Peter Isaac Thellusson now has or may have, and of such issue as my said grandson John Thellusson may have, and of such issue as any other sons of my said son Peter Isaac Thellusson may have, and of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have, as shall be living at the time of my decease, or born in due time afterwards; and after the deaths of the survivors and survivor of the several persons aforesaid, to such person as, at the time of the death of the survivor of the said several persons, shall then be the eldest male lineal descendant of my son Peter Isaac Thellusson and his heirs forever." At the time of the testator's death, there were seven persons actually born, answering the description mentioned in the testator's will: and there were two *in ventre sa mere*, answering the description, if children *in ventre sa mere* do answer that description. All the said several persons, so described in the testator's will, being dead; and at the death of the survivor of such several persons, there being living
447* one *male lineal descendant of the testator's son Peter Isaac Thellusson, and one only: Is such person entitled by law, under the legal effect of the devise above stated, and the legal construction of the several words in which the same is expressed, to the said manors, messuages, tenements, and hereditaments at Brodsworth?

II. If, at the death of the survivor of such several persons as aforesaid, such only male lineal descendant was not actually born, but was *in ventre sa mere*, would such lineal descendant, when actually born, be so entitled?

The Lord Chief Baron of the Court of Exchequer (Sir Archibald M'Donald) delivered their unanimous opinion upon the said questions in the affirmative.

The following is a note of his Lordship's speech on that occasion:

"The first objection to the will is, that the testator has exceeded that portion of time within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law, for three reasons. First, Because that so great a number of lives cannot be taken, as in the present instance, to protract the time during which the vesting is suspended; and, consequently, the power of alienation suspended. Secondly, That the testator has added to the lives of persons

who should be born at the time of his death, the lives of persons who might not. Thirdly, That after enumerating different classes of lives, during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words, '*as shall be living at my decease, or born in due time afterwards;*' that, as these words appertain only to the last class in the enumeration, the words which are used in the preceding classes being unrestricted, they will extend to grandchildren and great-grandchildren, and so make this executory devise void in its creation, as being too remote. With respect to the first ground, viz., the number of lives taken, which in the present instance is nine, I apprehend that no case or *dictum* has drawn any line, as to this point, which a testator is forbidden to pass. On the contrary, in the cases in which this subject has been considered, by the ablest Judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumscription, *but have *448 treated the number of existing lives as a matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation, during any one life; and that, in fact, the life of the survivor of many persons named or described is but the life of some one. This was held, without dissent, by Twisden, in Love *v.* Wyndham, 1 Mod. 50, twenty years before the determination of the Duke of Norfolk's case, who says, that the devise of a term may be for twenty lives, one after another, if all be in existence at once. By this expression, he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord Nottingham, as to the time within which the contingency must happen, he thus expresses himself:—'If a term be devised, or the trust of a term limited, to one for life, with twenty remainders for life successively, and all the persons are in existence and alive at the time of the limitation of their estates, these, though they look like a possibility upon a possibility, are all good, because they produce no inconvenience; they wear out in a little time.' With an easy interpretation, we find, from Lord Nottingham, what that tendency to a perpetuity is, which the policy of the law has considered as a public incon-

venience; namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations, that is, beyond the time at which one remainder-man would attain his age of twenty-one, if he were not born when the limitations were executed; when he declares, that he will stop where he finds an inconvenience, he cannot, consistently with a second construction of the context, be understood to mean, where Judges arbitrarily imagine they perceive an inconvenience; for he has himself stated where inconvenience begins, namely by an attempt to supersede the vesting longer than can be done by legal limitations. I understood him to mean that, wherever Courts perceive that such would be the effect, whatever may be the mode attempted, that effect must be prevented; and he gives the same, but no greater latitude, to executory devises and executory trusts as to estates tail. This has been ever since adopted; in Scatterwood *v.* Edge, 1 Salk. 229, the Court held, that an executory estate, to arise
449* *within the compass of a reasonable time, is good; as twenty or thirty years, so is the compass of a life or lives: for, let the lives be never so many, there must be a survivor, and so it is but the length of that life. In Humberston *v.* Humberston, 1 P. Wms. 332, where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence; Lord Cowper restrained that devise within the limits assigned to common-law conveyances, by giving estates for life to all those who were living, (at the death of the testator,) and estates tail to those who were unborn; considering all the coexisting lives, (a vast many in number,) as amounting in the end to no more than one life. His Lordship was in the situation, alluded to by Lord Nottingham, where a visible inconvenience appeared. The bounds, prescribed to limitations in common-law conveyances, were exceeded: the excess was cut off; and the devise confined within those limits. Lord Hardwicke repeats the same doctrine, in Sheffield *v.* Lord Orrery, 3 Atk. 282; using the words '*life*' or '*lives*,' without any restriction as to number. Many other cases might be cited to the like effect; but I shall only add what is laid down in two very modern cases. In Gurnel *v.* Wood, (*a*) Lord Chief Justice Willes speaks of a life or lives, without any qualification; and

(*a*) *Ante*, § 53.

Lord Thurlow, in Robinson *v.* Hardcastle, says, that a man may appoint 100 or 1000 trustees; and that the survivor of them shall appoint a life-estate. It appears, then, that the coëxisting lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked, shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered, that when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite impracticable, to ascertain the extinction of the lives described; and will be supported or avoided accordingly.

"But it is contended, that in these, and other cases, the persons during whose lives the suspension was to continue, were persons immediately connected with, or immediately leading to, the person in whom the property was first to vest, when the suspension *should be at an end. I am unable to find *450 any authority for considering this as a *sine quâ non* in the creation of a good executory trust. It is true that this will almost always be the case and mode of disposing of property, introduced and encouraged, up to a certain extent, for the convenience of families; which, in almost all instances, look to the existing members of the family of the testator, and its connections. But when the true reason for circumscribing the period, during which alienation may be suspended, is adverted to, there seems to be no ground or principle, that renders such an ingredient necessary. The principle is, the avoiding of a public loss, by placing property for too great a length of time out of commerce. The length of time will not be the greater or less, whether the lives taken have any interest vested or contingent, or have not; nor whether the lives are those of persons immediately connected with, or immediately leading to, that person in whom the property is first to vest; terms, to which it is difficult to annex any precise meaning. The policy of the law can no way be affected by those circumstances, which, I apprehend, look merely to duration of time. This could not be the opinion of Lord Thurlow, in Robinson *v.* Hardcastle; nor is any such opinion to be

found in any case, or book, upon this subject. The result of all the cases upon this point is thus summed up by Lord Chief Justice Willes, with his usual accuracy and perspicuity: (*a*) 'Executory devises have not been considered as mere possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints, to prevent perpetuities. As at first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years, at length it was extended a little farther, namely, to a child *in ventre sa mere*, at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to twenty-one years after the death of a person in being; as, in that case likewise, there is no danger of a perpetuity.' Comparing what the testator has done in the present case with what is above cited, it will appear, that he has not postponed the vesting even so long as he might have done.

451 * * "The second objection which has been made in this case (*b*) is, that the testator has added to the lives of persons, in being at the time of his decease, those of persons not then born. It becomes, therefore, necessary to discover, in what sense the testator meant to use the words '*born in due time afterwards.*' Such words, in the case of a man's own children, mean the time of gestation; what is to be intended by these words in this will, must be collected from the will itself. It may be collected from the will itself, that, by those words, the testator meant to describe the period of time, within which issue might be born, during whose lives the trust might legally continue; or, in other words, whom the law would consider as born at the time of his decease. Now, these could only be such children of the several persons named, as their respective mother were *ensient* with, at the time of his death. Or he may have meant to use the word *born*, as denoting that period of time, which would be the necessary period for effecting his purpose. This is proba-

(*a*) Willes, Rep. 215.

(*b*) 11 Ves. 138.

ble, from his using the same words as applied to the time, during which the presentation to the advowson of Marr might be suspended, without incurring a lapse. That a child *in ventre sa mere* was considered in existence, so as to be capable of taking by executory devise, was maintained by Powell in the case of Loddington *v.* Kyme, 1 Ld. Ray. 203; upon the ground, that the space of time between the death of the father, and the birth of the posthumous son, was so short, that no inconvenience could ensue. So, in Northey *v.* Strange, 1 P. Wms. 340, Sir John Trevor held that, by a devise to children and grandchildren, an unborn grandchild should take. Two years after, Lord Macclesfield, in Burdett *v.* Hopegood, 1 P. Wms. 486, held that, where the devise was to a cousin, if the testator should leave no son at the time of his death, a posthumous son should take, as being left at the testator's death. In Wallis *v.* Hodgson, 2 Atk. 117, Lord Hardwicke held, that a posthumous child was entitled under the Statute of Distribution, and his reason deserves notice. 'The principal reason,' says he, 'that I go upon, is, that the plaintiff was *in ventre sa mere* at the time of her brother's death, and, consequently, a person *in rerum naturâ;* so that, by the rules of the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's lifetime.' Such a child, in charging for the portions of other children living at the death *of the father, is included as then living; *452 Beale *v.* Doe, 1 P. Wms. 244; and so in a variety of other reports. In Basset *v.* Basset, Lord Hardwicke decreed rents and profits, which had accrued at the rent day preceding his birth, to a posthumous child: and, since the statute 10 and 11 Wm. III., such children seem to be considered in all cases of devise, and marriage or other settlement, to be living at the death of their father, although not born till after his decease. It is otherwise considered in the case of descent. In Doe *v.* Quartley, 1 T. R. 634, the devise was to Hester Read for life, daughter of Walter Read, and to the heirs of her body, and, for default of such issue, to such child as the wife of Walter Read is now *ensient* with, and the heirs of the body of such child; then to the right heirs of Walter Read and Mary his wife. It was contended, that the last limitation was too remote, as coming after a devise to one not in being, and his issue. But the Court said, that, since the statute of King William, which puts posthumous

children on the same footing with children born in the lifetime of their ancestor, this objection seemed to be removed, whatever was the case before. In Gulliver *v.* Wickett, 1 Wils. 105, the devise was to the wife for life, then to the child with which she was supposed to be *ensient*, in fee, provided that, if such child should die before twenty-one, leaving no issue, the reversion should go to other persons named. The Court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child *in ventre sa mere*, being *in futuro*, would have been a good executory devise. In Lancashire *v.* Doe, 5 Term R. 49, the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In Doe *v.* Clarke, Lord Chief Justice Eyre holds that, independently of intention, an infant *in ventre sa mere*, by the course and order of nature, is then living, and comes clearly within the description of children living at the parent's decease: and he professes not to accede to the distinction between the cases, in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children, who happened to have been actually born at the time of his death. The most recent case is that of Long *v.* Blackall; the Court of B. R. had no
453 * doubt, * that a devise to a child *in ventre sa mere*, in the first instance, was good; and a limitation over was good also, on the contingency of there being no issue male, or descendant of issue male, living at the death of such posthumous child. It seems then, that, if estates for life had been given to the several *cestuis que vie* in this will, and, after their deaths, to their children, either born or *in ventre sa mere* at the testator's death, they would have been good. No tendency to perpetuity, then, can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time during which the vesting of the property, which is the subject of this devise, shall be protracted; inasmuch, as the circulation of real property is no more fettered in the one case, than in the other. It is, however, observable that this question may never arise, if it shall so happen that the children, *in ventre matris* at the death of the testator, shall not survive those who were then born.

"The third ground of objection depends upon the application of the restrictive words, which are added to the enumeration of the different classes of persons during whose lives the restriction is suspended. This objection, I conceive, will be removed by the application of the usual rules in construing wills to the present case. First, where the intention of the testator is clear, and is consistent with the rules of law, that shall prevail. His intention evidently was, to prevent alienation, as long as by law he could: if, then, it is to be supposed, that the restrictive words are to be confined to the last of seven different descriptions, and that the testator intended to leave the four descriptions of persons, which immediately preceded this seventh class, without the benefit of such restriction, although they stand in need of it, we must do violence to all established rules on this head. That construction is to be adopted which will support the general intent. The grammatical rule, of referring qualifying words to the last of the antecedents, is not even supposed by grammarians themselves to apply, when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea of overlooking the plain intent, which is disclosed in the context; namely, that they should be applicable to such classes as require them; and, as to the others, to consider them as surplusage: if words will admit of more constructions than one, that which will *support the legal intention of the testator, is, in all cases, to be adopted. *454

"I do not trouble your Lordships with any observation upon the objections arising from the magnitude of the property in question, either as it now stands or may hereafter stand, or as to the motives which may have influenced this testator, nor his neglect of those considerations by which I, or any other individual, may or ought to have been moved: that would be to suppose, that such topics can in any way affect the judicial mind. For these imperfect reasons, I concur with the rest of the Judges in offering this answer to your Lordships' first question.

"As to the second question, the objection to such child being entitled, must arise from an allowance having been made for the time of gestation, at the end of the executory trusts: it seems to be settled, that an estate may be limited in the first instance

to a child unborn; and, I apprehend, to the first and other sons in fee, as purchasers. The case of Long *v.* Blackall seems to have decided, that an infant *in ventre matris* is a life in being. The established length of time, during which the vesting may be suspended, as a life or lives in being, the period of gestation, and the infancy of such posthumous child. If, then, this time has been allowed, in some cases at the beginning, and in others, at the termination of the suspension; and if such children are considered, by the construction of the statute 10 & 11 Will. III., as being born to such purposes; what should prevent the period of gestation from being allowed, both at the commencement and at the termination of the suspension, if called for? In those cases where it has been allowed at the commencement, and particularly in Long *v.* Blackall, it must have been obvious to the Court, that it might be wanting at the termination; yet that was never made an objection. In Gulliver *v.* Wickett, the child which was supposed to be *in ventre sa mere*, might have married and died before twenty-one, and left his wife *ensient:* in that case, a double allowance would have been required; yet that possibility was never made an objection, although it was obvious. In Long *v.* Blackall, according to the printed report, the precise point was not gone into; but it is plain that the attention of the Court, must have been drawn to it: for the learned Judge who argued that case in support of the devise, expressly
455* stated, *'that every common case of a limitation over, after a devise for a life in being, with remainder in trust to his unborn issue, includes the same contingency as was then in question: for the devisee for life may die, leaving his wife *ensient;* and the only difference is, that the period of gestation occurs at the beginning, instead of the end, of the first legal estate.' It must have been palpable, that it might possibly occur at both ends. Every reason, then, for allowing the period of gestation in the one case, seems to apply with equal force to the other, and leads the mind to this conclusion, that it ought to be allowed in both cases, or in neither case. But, natural justice having, in several cases, considered children *in ventre matris* as living at the death of the father, it should seem that no distinction can properly be made; but that, in the singular event of both periods being required, they should be allowed, as there can be no tendency to a perpetuity."

After the above opinion of the Judges had been delivered, the Lord Chancellor addressed the House as follows: "The learned Judges having given their opinion upon the points of law referred to them, there is nothing remaining for the consideration of the House, except one question, which could not be referred to the Judges. This cause was decided in the Court of Chancery by Lord Rosslyn, with the assistance of Lord Alvanley, Mr. Justice Buller, and Mr. Justice Lawrence; and I believe that I speak in the hearing of those who know, that the late Lord Kenyon could hardly be brought to consider these questions as fit to be argued, thinking it dangerous after what had been settled with respect to executory devises, to allow so much consideration to be given to them. His opinion upon the subject was never doubted. In the case of Robinson *v.* Hardcastle, it is laid down as unquestionably competent to a testator to give the power of appointing a life-estate to the survivor of a thousand persons, to begin at the decease of such survivor. Your Lordships, therefore, have the concurrent testimony of all the learned persons to whom I have alluded, as well as of the learned Judges whose unanimous opinion has been delivered this day, upon this great case. Not great indeed on account of the questions which it involves, or of any thing of which, as Judges, we can take notice, since the decision must be the same, whether the property in question be one hundred pounds, or seven hundred thousand *pounds per annum. If it were allowable to *456 entertain a wish upon the subject, perhaps we might all concur; but we are only to consider, whether there be any thing in this will to render it illegal. When it was said that an attempt to tie up property for nine lives was illegal, I thought that such a proposition could not be supported; for the length of time does not depend upon the number, but on the nature of the lives; if we are to argue on probabilities, two lives may last longer than nine or ten. If, in the year 1796, estates had been devised to accumulate during the lives of so many of the members of this House as have died since that time, it might have been argued, that the property was tied up for twenty or thirty lives; and yet this number of lives has worn out in a very short period. The question, therefore, cannot turn upon the magnitude of the property, or the number of the lives. The question is, whether there

be any rule of law which prescribes a period for which property may be unalienable? Now, the language of all the cases is this, that property may be so limited as to make it unalienable during any number of lives. I know no other rule but that. Such being the law, there is another question arising upon this will, which is a pure question of equity, whether a testator can direct the rents and profits to be accumulated during that period for which he may so make the property unalienable? That he may do so, I take to be most clear. In truth, I speak in the hearing of those who will assent to me when I say, that if the testator had given the residue of his personal estate to such person as should be the eldest male descendant of Peter Isaac Thellusson at the death of the survivor of all the lives, without more, that simple bequest would direct an accumulation, until it should be seen what person answered the description of that male descendant; and the effect of the common rules of law would have supplied the rest. The course of proceeding would have been to inquire, whether the executory devise of the personal estate to such future individual were good; and, if it were good, then, wherever the residue was given, the interests and profits would go likewise. There can be no more objection to such person taking the interest, than the capital itself. Suppose the nine persons during whose lives this property is tied up had been lunatics, the interests and profits would be accumulated without any direction. Nor does the policy of the law, which
457* respects perpetuities, *apply to the case of accumulation; the rents and profits are not locked up, but are constantly invested, and the fund is kept in a course of constant circulation. If, then, the fruits of the property are kept in constant circulation, while the property is limited, what objection can there be to accumulation? I remember, in the case of Mrs. Buckley's will, where the testatrix had given property to such son of her infant daughter as should first attain the age of twenty-one, Lord Kenyon, then Master of the Rolls, directed the whole profits to accumulate during that period, taking the rule to be quite clear, that, so long as the property was unalienable, he might direct the rents and profits to accumulate. And I speak with great sincerity when I say, that I never could entertain the least doubt upon the subject. If we lay aside all the cases which

have occurred since the act of the 39 and 40 Geo. III. there is nothing to impeach it. (*a*) That act was rather a matter of surprise upon me; and, perhaps, it is not one of the wisest legislative measures: it must be remembered, that it expressly alters what it takes to have been the former law, and confines the power of accumulation to twenty-one years. (*b*) But if your Lordships were to exercise the power of accumulation in all the cases allowed by the act, the accumulation would be enormous. It did not occur to those who penned the act of 39 & 40 Geo. III. that if this very will had been made subsequent to the passing of that act, the accumulation directed by the will would have gone on for twenty-one years. The Court of Chancery has decided (*c*) that if a person makes such a disposition of his property that it may be unalienable for a longer period than is allowed by the act, such disposition is only void for so much as exceeds the term of twenty-one years, leaving it good for the rest of the term. The only points which have ever appeared to me to bear an argument, have been those upon the critical meaning of the words, '*as shall be living at the time of my decease;*' and the words, '*or born in due time afterwards;*' which follow the description of the persons during whose lives the property is tied up. If, from any disinclination to give effect to the will, your Lordships were to construe the former words as referring to the last description of persons only, that disinclination would be gratified at the expense of overturning all the rules of construction which have been settled for ages; and even if your Lordships should feel inclined to give any relief by legislative interference, *which would be very bold, I am quite sure that *458
you will not be so bold as to give a wrong judgment in point of law.

"With respect to the other point, viz. '*born in due time afterwards,*' I observe, that according to the printed report, (*d*) one of the Judges held, that these words must refer to a child *in ventre sa mere;* and the others, that they amounted to a declaration of the testator's will, that the property should be unalienable and accumulate during the lives of all the persons, born or unborn, whom the law authorized him to take as lives. In my opinion,

(*a*) *Infra*, s. 59.
(*b*) [Fearne, Ex. Dev. p. 536, ed. 8.]
(*c*) Griffiths *v.* Vere, *infra*, s. 61.
(*d*) (11 Ves. 149.)

either of these constructions may be taken to be the true meaning, agreeably to the rules of law; but I must add, that, according to the rules of law, the House must put such a construction upon the words, as will support the testator's intention; it is, therefore, quite beside the question, to argue what child should take, because the testator is describing the lives of persons, in order to define the period of time during which the power of alienation is to be suspended, and the accumulation is to go on. But, if it were necessary, I should have no difficulty, as a lawyer, in stating to the House, that I think the rule of law has been rightly laid down, that the period of gestation is to be taken at the beginning and the end. In Gulliver *v.* Wickett, the devise was to a child of whom the mother was *ensient*, with a proviso, that the property should go over, if that child should die under twenty-one without issue; and in the construction of that devise, it was laid down, that the devise extended to the child *in ventre sa mere;* and that, if the child to whom it was given had attained twenty years of age, and married, and died leaving his wife *ensient*, it could not be said that the property was not vested. In the case of Long *v.* Blackall, I thought it my duty, as counsel, to submit to the consideration of the Chancellor such points as occurred to me in support of the interest of my client, and urged, that the allowance for the time of gestation was made at both ends. I thought that the point was not treated with the respect that it deserved. The Chancellor sent the case to the Court of King's Bench, but the point was not made; and when I pressed the Chancellor to send it there again, his answer was, that he was very much ashamed of ever having sent it there, and that he would not send it again. I
459 * know that Lord Kenyon's opinion was quite clear * upon the subject, as well as those of Mr. Justice Buller, and Mr. Justice Lawrence. This, therefore, is a case, in which the legal doctrine is clear; and, whatever may be our regret upon the subject, is it not our duty to determine according to law? When I put the question, whether this decree shall be reversed, I shall think myself bound to say, that I think it ought to be affirmed."

The decree was affirmed.

59. By the statute 39 & 40 Geo. III. c. 98, it is enacted, "That no person or persons shall, after the passing of that act, by any

deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than for the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated. And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void; and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to accumulate contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed. (*a*)

"Provided always, that nothing in that act contained should extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or
*wood upon any lands or tenements; but that all such *460
provisions and directions shall and may be made and given as if the act had not passed." (*b*)

60. Although a trust of accumulation created by will during the continuance of a life, is void under this statute, yet such trust will be supported by the Court of Chancery during the time allowed by the act, namely, twenty-one years.

61. Charlotte Matthews devised all her real estates to trustees, upon trust to sell, and gave all her personal estate to the said

(*a*) Hargrave, Jur. Exerc. Vol. 1, 307. (*b*) [Bacon *v.* Proctor, 1 Turn. & R. 31.]

trustees, upon trust, to invest the moneys to arise from the sale of her real estates, and her personal estate, in the public funds, upon trust, to pay the dividends to her sisters Elizabeth Mary Griffiths and Martha Vere, during their joint lives, in equal proportions; and after the decease of either of them, the whole to the survivor during her life. Provided, and she declared her will, that so much of the said dividends as should accrue due to Elizabeth Mary Griffiths during the life of John Griffiths, her husband, should not during that time be paid to her; but the same should be, during his life, invested by the trustees in the public funds, and that the dividends or interest which should accrue thereon, should be added to and accumulate with the capital; and upon the decease of the said John Griffiths, the said capital, with the accumulation thereof, should be forthwith paid to Elizabeth Mary Griffiths.

Under a bill by Mrs. Griffiths and her husband, the accounts having been directed against the trustees, who were also executors, a petition was presented by Mr. and Mrs. Griffiths, praying a declaration, that the proviso directing accumulation, was contrary to the statute 39 & 40 Geo. III. c. 98, and therefore null and void; and that the petitioners were entitled to have full benefit of the will, as if such clause had not been inserted. (*a*)

A petition for the same purpose had been presented to the Master of the Rolls, and dismissed.

In support of the petition, it was argued, that the meaning of the act was, that the whole attempt against which it was directed, should be void: it could not, therefore, be good for a given time, the legislature having intimated nothing to that effect. A direction to accumulate for a life, was a direction to accumulate for more than twenty-one years, a life-estate being larger than an estate for years. The value of the life was of no
461 * * importance, and the Court would not inquire into that.

This act was to be construed by analogy to the law of executory devises, which were allowed only within certain limits. As the accumulation might, by possibility, last longer than twenty-one years, the disposition was void, as a limitation over of personal property, after a disposition to a man and the heirs of his body, was void; without regard to the possible event, that

(*a*) Griffiths *v.* Vere, 9 Ves. 127.

they might be extinct within the period allowed by law. If the accumulation should, under the direction in the will, continue beyond the twenty-one years, what was to become of that which was accumulated after that period, and of the interest of the previous accumulation?

Against the petition, it was contended, that this case arose upon a statute restraining the legal right to dispose of property. Upon the construction of the act, it clearly was not intended to prevent accumulation in any case, after the death of the party, to the period of twenty-one years; and though an attempt was made to go beyond that, the purpose should be good to that extent, in whatever form it was directed; for no precise form of directing accumulation was prescribed, nor could that be intended; but it was sufficient, whatever the form, that it was not to exceed the period of twenty-one years. The direction that, so far as accumulation was directed contrary to the act, it should be void, applied only to the excess. There would be certainly some difficulty, in the event of the parties living beyond the period of twenty-one years, to determine what should become of the excess. But, if Mrs. Griffiths survived that period, she would be entitled to the accumulation, provided she survived her husband, to whose death it was confined; and it was possible that he might live only two or three years.

Lord Eldon said, the question turned on the will and the act of Parliament. He understood a petition to the same effect was presented to the Master of the Rolls, insisting that, by the will, accumulation was prescribed beyond what was allowed by the act, and therefore the direction was wholly void; and that then Mrs. Griffiths' husband was, within the terms of the act, entitled to the rents and profits, as if no such clause for accumulation was in the will. And the Master of the Rolls was of opinion, that, upon the true construction of the act, the accumulation directed during the life of the husband, if not in fact going *beyond twenty-one years, was good; and if it did *462 in fact continue beyond that period, yet, upon the true construction of the act, the direction was good *pro tanto;* and during the period of twenty-one years, the rents and profits were well directed to accumulate, leaving it to the law to determine what was to become of the rents and profits to accrue between

the end of the twenty-one years, and the expiration of the life; and, of course, to determine also what was to become of the interest of the fund created by the accumlation permitted for the period of twenty-one years.

The sort of case now before him was not, he believed, much in the contemplation of the legislature. It was material to attend to every word of the act, for the language was not very similar to any other act with either enabling or restraining clauses. The phrase, "*partial accumulation*," was rather expressive of the effect than of direction; but, considering the subsequent part, it must be construed what should be directed to be accumulated. If the act stopped at the declaration that it should be null and void, the estate in the mean time would be considered as not given, unless falling into the residuary devise; and therefore the rents and profits undisposed of must have gone to the heir. But the question was, whether the following words were not so explanatory of the former, as to show in what sense the legislature used the words declaring that it should be null and void; and whether, taking the whole clause together, it was not meant only as far as by the subsequent words it was directed to be so considered? The words "*so long*" admitted two constructions; one, so long as the same, by the effect of the direction in the will, should be capable of being accumulated beyond twenty-one years from the death; the other, so long as the same should be directed to be accumulated contrary to the provisions of the act; the accumulation being understood to be contrary to the act, if directed by the will for more than twenty-one years. It was obvious, that many cases upon the old law of executory devise and accumulation were not in any manner provided for by this act: he doubted whether the present case was thought of; for, by this will, the estate was given, not by executory devise, but by creating a trust to pay the annual profits, and then followed the direction for accumulation. If that direction was struck out, it was contended that the effect was not
463 * * as in other cases, that those profits would be undisposed of, but that it must be considered a gift *in præsenti;* and that the clause for accumulation did not prejudice their immediately entering into the enjoyment. If it was necessary to decide that question, a good deal was to be said upon it; and it was not

clear upon this will that it could necessarily be made out that there was a gift *in præsenti*, if this direction was struck out of the will, for the whole must be taken together. But, supposing it not struck out, was the direction void altogether, because it was not a direction for accumulation during twenty-one years or less, but which might happen to operate during a period that might last longer, admitting also that it might operate as a direction for less in effect? The point was doubtful; but, upon the whole, that construction which had been put upon the act was the right one; and he was the rather led to that, by the concurrence of opinion among those to whose assistance he had resorted upon the first construction of an act of so much importance, who all agreed, that this was the proper construction. Under these circumstances, finding the Master of the Rolls' opinion to be such as he had stated, and that it had the concurrence of those whom he had consulted, it would be enough for him, if it was only the inclination of his opinion, to say this was the right construction. (*a*)

The petition was dismissed.

62. It has been determined by Sir W. Grant, that a trust of a term during the minorities of tenants for life, or in tail, to receive and lay out the rents in stock, to accumulate for the benefit of the persons who should, upon the expiration of such minorities or death of the minors, become entitled to the rents, and of the age of twenty-one, was too remote; and being void in its creation, was incapable of modification, so as to establish it to the extent to which it might have been originally carried.

63. The trust of a term of 1000 years created by a settlement was declared to be,—That during the minority or minorities of the persons who for the time being should, under the limitations in the settlement, be immediate tenants for life, in tail male, or in tail, in possession, or actually entitled to the rents; the trustees should lay out the rents, after payment of certain incumbrances, in the public funds, to accumulate, and to stand possessed of such funds and the accumulation of the dividends in * trust for such person or persons as should, immediately * 464 upon the expiration of such minority or minorities, or

(*a*) Longdon *v.* Simson, 12 Ves. 295. Fearne's Cont. Rem. 536, 8th ed. [Haley *v.* Bannister, 4 Mad. 275.]

deaths of such minors, be tenants in possession, or entitled to the rents, and be of the age of twenty-one years. (*a*)

The bill contended, that the direction for the accumulation of the rents and profits during minority, until there should be a tenant in possession of the age of twenty-one years, was illegal and void; and that therefore the plaintiff, as tenant in tail, was entitled to all the estates, and to all the rents which should remain after discharging the incumbrances. It was argued for the plaintiff, that the question was, whether the direction to accumulate the rents during the successive minorities of tenants for life, or in tail, until there should be some tenant in tail adult to whom the whole accumulation was to be paid, was not too remote; as it might possibly endure much longer than the allowed limits. It might happen, though not probable, that this accumulation would go beyond a century; if, for instance, the then tenant for life, who was a minor, should marry and die under age, leaving a minor, who might do the same. In Griffiths *v.* Vere, (*b*) Lord Eldon laid it down as well settled, that the possibility that an executory devise might fall within the legal limits, would not support it. This trust of accumulation, therefore, not being within the act 39 & 40 Geo. III., must fall. (*c*)

On the other side it was said, that the direction for accumulation did not necessarily include a longer period than the law allowed; and might fall within those limits. It was not a plain direct transgression of the law; as the limitation in Lade *v.* Holford, (*d*) looking to a period of twenty-six years. That accumulation might proceed as long as the estate might be made unalienable, was admitted in the case of Mr. Thellusson's will. (*e*) All the consequences represented as flowing from this accumulation might happen upon any limitations in tail; a series of successive minorities preventing alienation. If, however, this trust went too far, it was void only for the excess, if capable of being clearly distinguished. It was valid, therefore, at least until a tenant in tail attained the age of twenty-one.

Sir W. Grant said, it was admitted on all sides in the case upon Mr. Thellusson's will, that a trust of accumulation could not exceed the limits of executory devise. It was on one side

(*a*) Southampton *v.* Hertford, 2 Ves. & Bea. 54. Marshall *v.* Holloway, 2 Swan. 432.
(*b*) *Ante*, § 61. (*c*) *Ante*, § 59. (*d*) *Ante*, v. 9. (*e*) *Ante*, § 58.

strenuously contended that it could not go so far; but it was *decided, that so long as an estate may be kept from *465 vesting, so long accumulation may be directed. An estate may be kept from vesting until an unborn child of a person in being attains the age of twenty-one: but an estate could not be limited so as to vest only in the first descendant of a person in being who might attain twenty-one; as that descendant might be a child of an unborn child, or a person more remote; and the period therefore much beyond the allowed limits. That was the direction as to the continuance of this accumulation, and the consequent suspension of vesting of the accumulated fund; as if there should be a succession of tenants for life, dying under twenty-one, the accumulation would be to continue, and the accumulated fund to vest only in a person attaining that age, however remote the period. To that extent it was impossible to support it; whether it could be supported to any extent he should not determine till he saw the case of Phipps *v.* Kelynge, in the Register's book.

A few days after, his Honor said he had examined that case, and found it was in substance as stated in the note to Fearne's Executory Devises: (*a*) but he did not think it would be found to be an authority for the proposition, that a trust for accumulation exceeding the allowed limits, was void only for the excess. His opinion therefore was, that this trust was altogether void, except so far as it was a trust for payment of debts.

(*a*) Fearne, Ex. Dev. App. No. 5, 8th edit. 615.

TITLE XXXIX.

MERGER.

BOOKS OF REFERENCE UNDER THIS TITLE.

RICHARD PRESTON. An Essay on the Quantity and Quality of Estates, with more immediate reference to the Law of MERGER.

This Essay, which forms the Third Volume of Mr. Preston's Treatise on Conveyancing, but is also separately published, is particularly commended to the student's attentive perusal. Mr. Hoffman terms it "his *chef d'œuvre*;" and Chancellor Kent regarded it as a "copious, clear, logical, and profound" discussion of the doctrine of which it treats.

ANDREW BISSET. A Practical Treatise on the Law of Estates for Life.

The eighth chapter of this work is devoted to the Law of Merger, as it affects Estates for Life; in which some of Mr. Preston's opinions are critically examined.

KENT'S COMMENTARIES. Vol. IV. Lect. 66.

POWELL ON MORTGAGES. Vol. II. p. 488–491. Coventry's Note, Vol. III. ch. 23, sec. 14, p. 1088–1089, *a*, with Rand's Note.

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Section 1. I. Merger is the annihilation by act of law, of the less, in the greater of two vested † estates, meeting without any intervening estate, in the same person, in the same right; or if in different rights, meeting in the same person by act of the party, and not by mere act of law, and so that the person in whom the estates thus meet in different rights by act of the party, shall have an absolute power of alienation over both estates.[1]

[† The estates must be vested, because a vested estate cannot merge in one that is contingent, for until the contingency happens, it has no existence. 3 Prest. Conv. 161. Ed. 3.]

[1] "Merger is not favored in equity, and is never allowed, unless for special reasons, and to promote the intention of the party. The intention is considered in merger at law, but it is not the governing principle of the rule, as it is in equity; and the rule sometimes takes place without regard to the intention, as in the instance mentioned by Lord Coke. At law, the doctrine of merger will operate, even though one of the estates be held in trust, and the other beneficially, by the same person; or both the estates be held by the same person, on the same or different trusts. But a court of equity will interpose, and support the interest of the *cestui que trust*, and not suffer the

2. Thus, for example, where A, tenant for life, with reversion to B in fee, surrenders his life-estate to B, or B releases to A in fee; by this union A's life-estate is absorbed in the inheritance; and the consequence is, the acceleration of the estate in reversion; which is not enlarged by the union of A's life-estate, but is brought into possession. Merger takes place as well in copyholds as in lands of other tenures. (*a*)

3. *Merger is distinguishable from suspension;* the latter being the partial absorption occasioned by the temporary union of two estates or interest; as where the lord, tenant for life of a manor, purchases the fee of a customary freehold tenement held of the same manor, the seignory is suspended during the life of the lord; had the tenement been pure copyhold, instead of customary freehold, the copyhold would have been extinguished. (*b*) †

4. *Extinguishment* also *differs from merger*, and more especially denotes the annihilation of a collateral subject, right or interest in the estate out of which it is derived; as
468* where the *tenant in fee of a copyhold tenement purchases the services or seignory of his particular tenement, the services will be extinguished; so where a rent-charge in fee devolves upon the tenant in fee of the inheritance upon which it is charged, the rent is extinguished. So again where the tenant

(*a*) Dove *v.* Williot, Cro. Eliz. 160.

(*b*) Bingham *v.* Woodgate, 1 Rus. & Myl. 32. Sup. Vol. I. p. 258, s. 16.

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trust to merge in the legal estate, if the justice of the case requires it. Unless, however, there exists some beneficial interest that requires to be protected, or some just intention to the contrary, and the equitable or legal estates unite in the same person, the equitable trust will merge in the legal title; for, as a general rule, a person cannot be a trustee for himself. Where the legal and the equitable interests descended through different channels, and united in the same person, and were equal and coextensive, it has been held, that the equitable estate merges in the legal, in equity, as well as at law. The rule at law is inflexible; but in equity it depends upon circumstances, and is governed by the intention, either expressed or implied, (if it be a just and fair intention,) of the person in whom the estates unite, and the purposes of justice, whether the equitable estate shall merge, or be kept in existence. If the person in whom the estates unite be not competent, as by reason of infancy or lunacy, to make an election, or if it be for his interest to keep the equitable estate on foot, the law will not imply such an intention." 4 Kent, Comm. 102; [Simonton *v.* Gray, 34 Maine, (4 Red.) 50; Campbell *v.* Carter, 14 Ill. 286; Jarvis *v.* Frink, Ib. 396; Davis *v.* Barrett, 11 Eng. Law & Eq. 317.]

[† See also St. Paul *v.* Lord Dudley & Ward, 15 Ves. 167; Roe *v.* Briggs, 16 East, 415; 1 Watk. Cop. [362;] King *v.* Moody, 2 Sim. & Stu. 579.]

for life, in tail, or in fee of the manor, purchases and takes a surrender of the inheritance of a copyhold tenement held of the same manor, the copyhold tenure is extinguished. So likewise where an *interesse termini* is released to him in reversion, the former is extinguished. (*a*)†

5. *Implied surrender* is also to be *distinguished from merger.* Where lessee for twenty years takes a new lease of the same premises for thirty years, at an increased rent, to commence *instanter;* this is an implied surrender of the lease for twenty years: it does not merge in the term of thirty years, but the law holds the acceptance of the latter to be an implied surrender of the former from the inconsistency of the two contracts; the occupation under the one, being incompatible with the terms of the other; and the result is the same, although the second lease is for a less term than the first: as were lessee for life or for twenty years accepts another lease for two years, or where the second lease is voidable on condition. (*b*)

6. *Merger* is *generally absolute*, but *sometimes conditional:* as against one person an estate may be merged, while against another it may have continuance of interest, as will appear in a subsequent page. ‡

7. So it has *sometimes a partial operation*, or rather operates upon a moiety, or other undivided portion of the estate; as where a term is assigned to one of several joint tenants of the inheritance, there will in such case be a merger of the term in an aliquot part in respect of which a severance takes place. So where the inheritance is conveyed to, or descends upon, one of several joint tenants of a term, or where the inheritance descends, or is conveyed to one of several joint tenants for life. (*c*) §

8. A more detailed analysis of the definition of merger before given with its qualifications, will lead, *first*, to the consideration of the requisites to the operation of merger; *secondly*,

(*a*) Sup. tit. x. c. 6; Bunker *v.* Cooke, 11 Mod. 129; Roe *v.* Wegg, 6 T. R. 708, 710; St. Paul *v.* Ld. Dudley & Ward; King *v.* Moody, *ubi sup.*

(*b*) Shep. Touch. Surrender, p. [301.]

(*c*) Bovy's case, 1 Vent. 193. *Infra*, ss. 106, 107, 108.

[† Salmon *v.* Swann, Cro. Jac. 619.]

[‡ Perk. s. 624; Com. Dig. Surr. Co. Lit. 333; *Infra*, ss. 25, 26.]

[§ Taylor *v.* Sayer, Cro. Eliz. 742; Wiscot's case, 2 Rep. 60.]

469* *of those cases where union of two or more estates is not productive of merger: and *thirdly* of the consequences resulting from merger; and herein of its effects,—1. Upon the party whose estate is merged,—2. Upon persons having interests derived out of that estate,—and 3. Upon the estate in which the merged estate is absorbed.

9. II. The *first requisite* which must concur in that union of two or more estates from which merger will result, is the following, that the *two estates must meet in the same person*, in the same part of the land, without any intervening vested estate, and without any intervening contingent remainder created by the same instrument by which the other estates are created. (*a*)

10. For example, where A, tenant for life, with remainder to B for life, with remainder to C in fee, purchases and takes a conveyance of C's remainder in fee to himself, A's life-estate is not merged on account of the intervening estate of B. (*b*)

11. Again, where an estate is limited by the same instrument to A, for life, remainder to his first and other unborn sons in tail male, remainder to A, in fee, the union of the life-estate of A, with the remainder in fee will not be absolute, so as to destroy the contingent remainder to his first and other sons, as will be noticed in a future page, until this protection is taken away by A's doing some act by which he compounds his life-estate with the remainder. (*c*)

12. But to illustrate further the requisite now under consideration. A, lessee for twenty years, with remainder to B for thirty years, purchases and takes a conveyance to himself of the reversion in fee; his term of twenty years is not merged, on account of the intervening term of B. † But the case is different where the owner of the particular estate creates a lease, and then surrenders his estate to the reversioner. ‡ The privity remains, notwithstanding, between the particular estate and the remainder

(*a*) s. 12, *infra*. (Roberts *v.* Jackson, 1 Wend. 478. James *v.* Morey, 2 Cowen, 246.)
(*b*) Duncomb *v.* Duncomb, 3 Lev. 437. Bates's case, 1 Salk. 254.
(*c*) Wiscot's case. 2 Rep. 60. *Infra*, § 85, 86.

[† Brook, Exting. 55; Whitchurch *v.* Whitchurch, 2 P. Will. 236; Scott *v.* Fenhoullet, 1 Bro. C. C. 69; 15 Vin. Ab. 362; Coleburn *v.* Mixtone, 1 Leon. 129, as corrected in Doe *v.* Walker, 5 B. & Cr. 111, 123.]

[‡ See Burton *v.* Barclay, 7 Bing. 745]; [Reed *v.* Latson, 15 Barb. 9; Clift *v.* White, Ib. 70; Logan *v.* Green, 4 Ire. Eq. 370.]

or reversion; for the lease is a portion of the particular estate. If, therefore, A, tenant for life, with remainder to C in fee, grants a lease to B for years, and afterwards surrenders his life-
*estate to C, his life-estate merges, although the under- *470
lease continues. (*a*) †

13. Again, if an estate be devised to the heir for life, the descent of the immediate reversion to him will merge his life-estate. (*b*)

14. (2.) *Another requisite* is, that *merger must take place between one or more estates.* An estate for life cannot merge in a right to the reversion; as where tenant in tail discontinued and granted an estate for life, and died without issue in the lifetime of tenant for life, who afterwards surrendered to the person having the right to the remainder expectant on the estate tail which was discontinued; no merger took place upon the surrender, but the estate for life and the new reversion (created by wrong, by means of the discontinuance,) continued; there was no remitter, and consequently no estate in which the life-estate could merge.‡

15. So *neither will a mere right*, such as an *interesse termini* intervening, *prevent the merger of the two estates:* as where A granted a lease to B for ten years, to commence immediately, and afterwards leased the same land to C for a term of ten years, to commence at Michaelmas following; and afterwards B, before Michaelmas, purchased, and took a conveyance to himself of the reversion in fee. It was the opinion of the Court of C. B. in an anonymous case in Dyer, that C might enter after Michaelmas, and enjoy his term; consequently, the term of B was merged, notwithstanding the *interesse termini.* (*c*)

16. Again, in the recent case of Doe *v.* Walker, A granted a lease to B for twenty-one years, to expire at Michaelmas, 1809: in December, 1799, he granted a further lease to B for sixty years, to commence from Michaelmas, 1809: A died in 1800, and de-

(*a*) Co. Lit. 185, a. (*b*) Godbold *v.* Freestone, 3 Lev. 406. *Vid. infr.* s. 75.
(*c*) *Vid.* sup. Vol. I. Tit. 8, c. 2, s. 31, et seq. Dyer, 112, a.

[† Webb *v.* Russell, 3 T. R. 393; *Inf.* s. 110; see also Ld. T. *v.* Barton, Moor, 94; Thorn *v.* Woolcombe, 3 B. & Adol. 586.]

[‡ Pauling *v.* Hardy, Skin. 3, 62, B. 55; 3 Pres. Conv. 56. Ed. 3; 2 Roll. 497, Pl. 16; Garraway's case, cited, Hard. 417; Stephens *v.* Britridge, 1 Lev. 36.]

vised the reversion to B for life, who, in 1806, before the period for the commencement of the lease of sixty years, conveyed his life-estate to C. Bayley, J., held, that the *interesse termini* was not extinguished in B's life-estate; observing, that B had nothing but his life-estate until 1809, and nothing but the sixty years' lease after that period; meaning of course, by that expression, that the lease of twenty-one years was merged in the life-estate. (*a*)

471* *17. The preceding case is also an authority that an *interesse termini* to commence *in futuro*, and which consequently, does not give an immediate right to the possession by becoming a term in fact, is not extinguished by the accession of the freehold devised to the person having that *interesse termini*, so long as the estate gives only a future right to the possession.

18. But although an *interesse termini* will not, properly speaking, merge, it may, nevertheless, be *extinguished by release.*

19. Thus, where A granted a lease to B for one hundred years, to commence on the death of C, and during C's life B assigned all his interest in the term of one hundred years to A, the *interesse termini* was extinguished. (*b*)

20. (3.) But the estates must not only meet in the same person without any vested intervening estate; but must, as a *third requisite*, be *in the same part of the land.*

21. Thus, where A is tenant for life, with reversion to B in fee of one moiety, and tenant in tail in possession of the other moiety, no merger of A's estate for life takes place; for the two estates are as distinct, as if he were tenant for life of Black Acre, and tenant in tail of White Acre. But if B were to release the reversion in fee of his moiety to A, then a merger of A's life-estate, by its union with the reversion in the same moiety, will take place. (*c*)

22. Again, where A and B are tenants in common in fee, each has an undivided moiety; A conveys his moiety to C for life, and B dies, and his moiety descends to C; C's estates will not merge, they are in distinct parts of the land; he has a life-estate in one moiety, the fee in another.

(*a*) 5 Bar. & Cres. 111. (*b*) Salmon *v.* Swann, Cro. Jac. 619.
(*c*) See Oakley *v.* Smith, Amb. 368. Church *v.* Edwards, 2 Bro. C. C. 180.

23. So, where A and B are tenants in common, or joint-tenants for life, with remainder to C in fee, and A conveys his estate for life to C; a merger takes place only of A's moiety; and B and C will then be tenants in common of the freehold, C having the inheritance in fee of one moiety *in possession*, and of the other moiety in remainder, expectant upon B's life-estate.

24. Where a tenant for life accepts a grant to him and another jointly in fee, there will be a merger for one moiety, and a severance of the joint-tenancy: and so also where tenant for life conveys his life-estate to one of two joint-tenants of the reversion in fee; there will be a merger of a moiety only and a severance of * the joint-tenancy. So again, where the reversion * 472 descends to one of two joint tenants for life, or one of two joint-tenants for life purchases, and takes a conveyance to himself of the reversion, the jointure is severed, and merger of the life-estate, as to one moiety, takes place. The law is the same where a term of years is assigned to one of two or more joint-tenants of the inheritance; in which case an aliquot part only, and not the entirety of the term will merge, as noticed in a former page, and for which Sir Ralph Bovey's case is an authority. For although joint-tenants are seised *per tout* as well as *per mie*, yet for the purposes of merger, they are considered generally as having only aliquot proportions; and this peculiarity of their tenancy, that they hold *per tout*, would apply as forcibly in favor of a merger of the entirety, in the case above supposed of a grant from the tenant for life, to one of two joint-tenants of the reversion in fee, as in that of a term for years. (*a*)

25. It was before shown that an intervening vested estate would prevent the union, and, consequent merger of estates which it keeps distinct; but if the *intervening estate* be *in contingency*, it *will not prevent the union and consequent merger of the other estates:* although this union, in some instances, will not produce an absolute but only a temporary or conditional merger; so that the estates will open again to let in the contingent estate, when the event happens upon which it is to arise.

26. Thus, *where an estate is limited by the same deed* to A for

(*a*) 1 Inst. 182 b. 2 Rep. 60. Brooke Ab. Surren. pl. 11. Vent. 193. See also 3 Prest. Conv. 478. Ib. 88–9.

life, remainder to his first and other unborn sons in tail male, remainder to A in fee; the remainder to A in fee is *executed sub modo;* so as to let in the contingent remainders to A's first and other sons, as they come *in esse.* (*a*)

27. But the *union will be absolute* which is produced by a *distinct transaction*, or *act of law*, so as to produce the merger of the particular estate; as when A, in the case supposed in the last section, before a son born, does some act by which he consolidates the two estates, namely, by conveying his life-estate and remainder in fee to B in fee; the particular estate is destroyed, and, with it, the contingent remainders to A's first and other sons which depended upon it. (*b*)

28. Again, where an estate is limited to A and B and the heirs of the survivor, and they concur in conveying their
473* estate *to the reversioner in fee, the contingent remainder is destroyed by the merger of the particular estate by which it was supported, in the reversion. (*c*)

29. But where the descent of the reversion is immediate upon the owner of the particular estate which supports the contingent remainder, as the heir of the person by whose will the particular estate and remainder are created, it should seem that the merger will not destroy the contingent remainder; inasmuch as the descent takes place at the very instant the will comes into operation. But where the descent of the reversion is not immediate from the testator, as where the reversion descends to the owner of the particular estate from some other person than the testator, there the merger will take place. So, if the owner of the particular estate, in the case supposed, purchased the reversion, the merger would also have been absolute. (*d*)

30. *Sometimes the consequences of the merger* of an immediate particular estate, upon which a contingent remainder depends, *are suspended* during the continuance of a prior particular estate; thus, where an estate is limited to A for life, remainder to B for life, remainder to the first and other unborn sons of B in tail male, remainder to C in fee, and, by subsequent de-

(*a*) Lewis Bowles's case, 11 Rep. 79. *Vide infra*, s. 30.

(*b*) See Hasker *v.* Sutton, 1 Bing. 500. Doe *v.* Howell, 10 B. & Cr. 191.

(*c*) Re Harrison, 3 Anst. 836. Butler's note, 78, Co. Lit. 191, a.

(*d*) Plunket *v.* Holmes, 1 Lev. 11. T. Raym. 28. Boothby *v.* Vernon, 9 Mod. 147, 150. Fearne, Cont. Rem. 341, ed. 1824. *Infra*, s. 67. Hooker *v.* Hooker, Hardw. 13. Crump *v.* Norwood, 7 Taunt. 362.

scent or conveyance, the remainder of C devolves upon B, during the continuance of A's life-estate, the contingent remainder to B's first and other sons is preserved. But if A surrenders to B, or dies before a son is born, the particular estates being determined, the contingent remainders are destroyed; the merger, on the accession of one estate to the other, having been produced by a distinct and subsequent act or conveyance. (*a*)

31. (4.) *Another requisite* that must concur in the union of two estates, in order to produce the merger of one of them, is, that *the estate in immediate remainder or reversion must in quantity be as large as, or larger than the preceding estate.* Thus, where A, lessee for years, afterwards takes a conveyance of the immediate reversion for his life, to take effect immediately the term is extinct. But where a grant is made to A for life, and afterwards a grant of the reversion is made to him for twenty years, there A has both estates, and no merger ensues, because the estate in reversion is less than the preceding estate.

32. Again, where A is tenant for life, remainder to B for life, and A surrenders to B, A's estate merges; B's estate in remainder *being for his own life, is to him greater than *474 A's estate, which to B is an estate *pour autre vie.* But if B were to convey his life-estate in reversion to A no merger would ensue; because B's estate is to A less than A's own estate, and consequently A's ownership will comprise the duration of both estates. (*b*)

33. Again, where an estate is limited to A for twenty-one years, remainder to B for life, remainder to A for life, remainder to A for one thousand years, remainder to C in fee, and B conveys his life-estate to A; B's estate merges in A's life-estate, that being the next freehold in reversion, and, as to A, greater than B's estate: the term of twenty-one years then merges in A's life-estate; the intervening estate for life in B, which kept them apart being removed, and A's life-estate being larger than the term: but A's term of one thousand years next in remainder being less than his freehold estate for life, the latter cannot merge therein. If C were to convey his remainder in fee to A, or upon C's death it were to descend upon A, the term of one

(*a*) Davies *v.* Bush, 1 M'Cl. & Yo. 58, 82.
(*b*) Lewis Bowles's case, 11 Rep. 83. 4th Resolution. Owen 38. Co. Lit. 54, b.

thousand years would immediately merge in the remainder in fee, and then the life-estate would, upon the merger of the term, be also absorbed in the reversion in fee. (*a*)

34. The reader will observe upon the case last supposed, that merger may take place between several estates at the same time, until the whole become absorbed in the more remote estate. This may be further illustrated. An estate was limited to A for life, remainder to B in tail male, remainder to A in tail male, remainder to B in tail general, remainder to A in fee. A and B joined in levying a fine to enure to A in fee; all the estates concurred, and merged in the ultimate remainder in fee of A. By the fine the several estates tail were converted into base fees, and, as such, became capable of merger; first the time of B's estate tail general, next that of A's estate tail male, then that of B's estate tail male, and then in retrograde succession the estate for life of A merged in the remainder in fee of A; the more remote estates being absorbed before those which are more immediate. (*b*)

35. A doubt has been raised, whether one life-estate will merge in an another life-estate next in *remainder*, when they are equal in quantity; as where A, tenant for the life of B, surrenders to C tenant for the life of D. Where, however, in the last case, A and C concur in conveying their respective
475* estates to *a stranger, with the intention that the grantee may enjoy the estate during the period of the collective ownership of the two estates, authority is not wanting in support of the proposition that merger does not take place, and this indeed appears to be law. (*c*)

36. In reference to the last observation, the reader is referred to a future page for the consideration of the proposition which has been extracted from Bredon's case, and Treport's case, that the union of two estates in the same person, by means of the joint act of the respective owners, with the intention that the estate of their assignee should continue for the collective time of their several estates, will not be any cause of merger. As where A, tenant for life, and B, tenant in tail, next in remainder, made a feoffment or levied a fine to C in fee, it is said, that although

(*a*) *Supra*, s. 31.

(*b*) Holt *v.* Sambach, Cro. Car. 103. Hetley, 74. Hutt. 96. See also Thorn *v.* Woollcombe, 3 B. & Adol. 586.

(*c*) 3 Prest. Conv. 229. Ed. 3, on Co. Lit. 299.

there was a union of the life-estate with the ownership of the base fee in C, yet there was no merger; and if B died without issue during the lifetime of A, the ownership of C would continue during A's life. (*a*)

37. There is a *gradation* not only in the *quantity or duration* of estates, but also in their *quality*. Their gradation in respect of *quantity* is, *first*, estates of inheritance, and in the following order, fees simple, fees determinable, qualified or base, and estates tail; *secondly*, estates of freehold, such as, estates tail after possibility of issue extinct, which for the purpose of merger are considered life-estates, estates for life absolute or determinable; *thirdly*, chattels, such as terms for years, and certain other interests, which, although not strictly speaking, terms, are nevertheless classed with them as chattel interests in land, namely, estates by extent, and by statute merchant, statute staple, estates devised to executors for payment of debts, and estates at will. With respect to life-estates, an estate for a man's own life, as before observed, is considered by the law as greater to him than an estate for the life of another. With respect to their *quality*,† an estate in *reversion* is considered greater than an estate in *possession*, though in other respects equal; and with
* regard to terms for years, though the term in reversion *476
be of smaller duration. (*b*)

38. It was long considered an unsettled point, whether *one term would merge in another term in reversion*, or according to the quaint language of the early authorities, whether "years would drown in years." The cases on this subject are discussed in the valuable volume to which frequent reference is made in

(*a*) *Infra*, ss. 43, 85, 91. 1 Rep. 77. 1 Salk. 338. 6 Rep. 14. See also Earl of Clanrickard's case, Hob. 273. 3 Prest. Con. 409, 410, 413. Ed. 3.

(*b*) *Supr.* tit. xiv. § 77. Dighton *v.* Greenvil, 2 Vent. 321, 327. Colles's Parl. Ca. 64. Heydon *v.* Smith, Moor, 662.

[† The reader is here reminded "that by the *quantity* of estates, must be understood, the *extent* or continuance of time, or degree, or interest of the estate; as for years, for life, or in fee. By the *quality* of an estate, the nature, incidents, and other collateral qualifications of that interest," such as its being in possession, or reversion; absolute or conditional; in severalty, joint-tenancy, coparcenary, or in common; and, in reference to the subject of the present chapter, may be added, legal or equitable. Prest. Essay on Estates, 7.]

the course of this chapter, and the learned author arrives at the conclusion, that the affirmative of the question must be considered established law, and as having been decided so long ago as in the case of Hughes *v.* Robotham. (*a*)

39. The recent case of Stephens *v.* Bridges seems now to have settled the point. In that case, a mortgage term of one thousand years was created in 1720, and another for five hundred years in the same premises in 1725. The former, together with the mortgage debt, for which it was a security, vested in A, and upon her death, devolved upon her executors, who, in 1780 took an assignment of the five hundred years' term, with the debt due thereon. In 1795, the executors assigned both terms to trustees on the marriage of the legatee, entitled to them under A's will. Sir John Leach, V. C., held that the one thousand years' term merged in the reversionary term of five hundred years. (*b*)

40. From the preceding authorities, the reader will perceive the doctrine to be now settled, that one term will merge in another term in *reversion*, although the latter be for a much shorter duration, and upon the principle that *nemo potest esse dominus et tenens:* but it will be proper in this place to observe, that a doubt exists respecting the merger of one term in another, when the latter term is not in reversion, but a term to *remainder*. Thus, where lands are conveyed to the use of A for one hundred years, with remainder after its expiration to B for ninety-nine years; the question is, whether if A assigns his term to B it will merge in B's term for ninety-nine years; or whether B will have the ownership during the collective period of both terms. Mr. Preston seems to incline to the opinion, that merger will ensue; but acknowledges the point doubtful, and adds, that as far as reason and good sense ought to prevail, and technical rules be exploded,

477 * it seems to be reasonable, that the assignee of two several terms, one in possession, the other in remainder, should * be entitled to hold the possession for both these terms; since from the nature of these interests, there is not any incompatibility between them; and the time of one estate is quite distinct from the time of the other. (*c*)

41. It may be further observed, in opposition to the applica-

(*a*) 3 Prest. Conv. 182–200. Cro. Eliz. 302. (*b*) Mad. & Geld. 66.
(*c*) 3 Prest. Conv. 201.

tion of the doctrine of merger, in the above instance, that although there is privity of *estate*, between the termor in possession and the termor in remainder, there is none in *tenure;* each of the termors alike holding of the reversioner; so that their existence is not incompatible with the maxim, *non potest esse dominus et tenens:* and although every term may in legal parlance be designated as of the same quantity, yet in actual duration or numerical quantity, the term in remainder, in the case above supposed, is less; but even if it were equal in duration, the rule is, that equal estates do not merge. (*a*)

42. The argument, that merger does not take place from the union of the term in possession with the term in remainder, is strengthened by the authorities before referred to, and cited in a future page, respecting the union of a life-estate in possession with a life-estate in remainder, both being equal; and if in the latter instance merger does not result from their union in the same person, because there is nothing incompatible in their coexistence, the argument by analogy holds with equal force respecting terms for years similarly circumstanced. (*b*)

43. Mr. Preston seems to think, that when these life-estates are equal,[1] and meet in the same person, the former will merge in the latter, except, as will be again noticed in a future page, when, upon the authority of Treport's and Bredon's cases, the two equal life-estates are conveyed to a third person *with the intent of conferring upon* him the ownership for the collective duration of both estates; but it appears to be doubtful whether, in the former case, the merger of two equal life-estates will take place, even when not conveyed with the intent to confer combined ownership; and Mr. Preston seems to admit that the point is doubtful; because, he adds, "if the two estates do continue distinct, this may be another difference arising from a *remainder* as distinguished from a *reversion*." (*c*)

44. The author of the present chapter is inclined to the opinion, that merger will not take place, where two equal life-estates, the one in possession, the other in *remainder*, meet in the *same person, although they were conveyed for the pur- *478

(*a*) Sect. 87. 11 Rep. 81. (*b*) *Supra*, s. 36. *Infra*, s. 77, et. seq. (*c*) 3 Prest. Conv. 229.

[1] See Bisset on Estates, p. 183.

pose of effecting the merger of the prior life-estate; and upon the principle before stated in the fortieth section. That principle presents a solution by which several cases, which would otherwise be anomalous, may be reconciled, and that too, in consistency with other established rules involved in the learning of merger.

45. The principle which, it is submitted, must govern the preceding cases, is this, that, being equal estates, the one in possession, the other in *remainder*, either for life or for years, they may coexist as continuing interests in the same person in the same right, because the incompatible relations of *dominus et tenens* not meeting in the same person do not call for the absorption of the one in the other. These cases are also an illustration of the rule before mentioned, that equal estates do not merge.

46. If the above principle will prevent the merger of terms, where the term in remainder is *equal* or *less* than the term in possession, a question occurs, whether, if the term in remainder were larger in duration than the preceding term, the above rule would keep them as continuing interests, or whether merger must be the consequence of their union, the less being absorbed in the greater. The writer is not aware that the question has anywhere been raised, but he inclines to think that it would be more consistent with principle, that merger should not take place; for the terms, although unequal in numerical duration, are nevertheless, in legal designation, of equal quantity.

47. In connection with the present branch of the subject of this chapter, the reader is here reminded, that a term will not merge in an *interesse termini*, nor *e converso*, as will be seen from the authorities cited in a former page. In the case of Doe *v.* Walker, there more fully stated, A, in 1788, granted a lease to B for twenty-one years, to expire at Michaelmas, 1809; and in December, 1799, he granted a further lease to B for sixty years, to commence from Michaelmas, 1809. In 1800, A devised the reversion to B, for life. It was held that the term of twenty-one years merged, but the *interesse termini* remained. (*a*)

48. This doctrine was recognized by the Master of the Rolls in the earlier case of Whitchurch *v.* Whitchurch. (*b*)

(*a*) *Supra*, s. 15. 5 Bar. & Cr. 111.

(*b*) 2 P. Will. 236.

49. These interests by way of *interesse termini* do not pass the immediate reversion; they rest in contract only until the *future period arrives when the term is to commence; *479 and in the case of Doe *v.* Walker, the two interests, namely, the term of twenty-one years to expire at Michaelmas, and the *interesse termini* to commence at its expiration, though in the same person, were not incompatible; and therefore, B's entering into the contract for the future term, could not be considered an implied surrender of the lease of twenty-one years in possession.

50. Interests by way of *interesse termini*, or contracts for a term to commence at a future period, are distinguishable from a lease of the reversion or concurrent lease, in this respect, that the latter gives to the lessee, the right of seignory incident to the present right to the reversion, as in the case of Colebourn *v.* Mixtone; while the former rests merely in contract, no present interest passing. When, therefore, a lease in possession and a lease of the reversion unite in the same person, merger takes place. (*a*)

51. (5.) A *further requisite* in the union of two estates in order to produce the consequence of merger, is, that they *must either meet in the same person in the same right; or* if in *different* rights, the union must take place *by act of the party.*

52. In reference to the former branch of the above rule, (namely,) where the two estates meet in the *same person* in the *same right*, it is to be observed, that the less estate will merge in the greater, whether the union is produced by act of law or by act of the party; as where the reversion in fee descends † upon or is devised ‡ to or purchased by the lessee, the term will merge, for *nemo potest esse dominus et tenens.* So also, where the reversion in fee or a remainder in tail descends upon the tenant for life, or he purchases the reversion in fee.

53. But where two estates meet in the *same person* in *different rights*, merger will not ensue unless the union takes place *by act of the party;* as where the husband holding a term in right of

(*a*) 1 Leon, 129, as cited and corrected by Bayley, J., in Doe *v.* Walker, 5 Bar. & Cr. 123.

[† Lee's case, 3 Leon. 110; Chamberlain *v.* Ewer, 2 Bulst. 12.]

[‡ Doe *v.* Walker, 5 B. & Cres. 111.]

his wife purchases the reversion; † or the lessee assigns his term to the wife of the lessor; ‡ or where an executor has a term in right of his testator and purchases the reversion. §

480* * But in the latter case, although the term will merge at law, in equity it will be considered assets for the benefit of creditors. ||

54. (6.) The latter branch of the last rule, must, however, it should seem, be received with the *qualification*, which introduces a *further requisite*, namely, that when the several estates meet in the same person, and are held in different rights, merger will not take place, unless *the power of alienation*, of the person in whom they meet, *extends to both estates.* (*a*)

55. The application of the last rule, respecting the absolute power of alienation over the two estates, which meet in different rights, is obvious as between husband and wife; as where a *feme covert* is tenant for life, and her husband purchases the reversion in fee; the husband is seised of the freehold in right of his wife, but her freehold does not merge in the inheritance of her husband, as was noticed in a former title; for the husband alone cannot, in virtue of his marital right, dispose of his wife's freehold, so as to preclude her from resuming her estate at his death; her estate could not, previously to the recent statute 3 & 4 Will. IV. c. 74, be conveyed without her concurrence in a fine or recovery, nor can it now, without her concurrence, in a deed in conformity with the provisions of that act. (*b*)

56. It was before observed, that if two estates in different rights meet in the same person *by act of the party*, merger will take place; but when the union is produced *by act of law*, the same consequence will not follow. Thus, in the instance of *marriage*, where a woman termor marries the reversioner, the term will not merge, because it devolves upon the husband *by act of law*. Again, in the case of *descent*, where the husband termor

(*a*) 3 Prest. Con. 293, ed. 3. Lichden *v.* Windsmore, 2 Roll. Rep. 472.
(*b*) *Ante*, tit. 8. Lease for Years, c. 2, s. 42. Stephens *v.* Britridge, 1 Lev. 36.

[† Downing *v.* Seymour, Cro. Eliz. 912.]
[‡ Moor, 171; Jenk. R. 73, case 38.]
[§ Leon. 38; 1 Roll. Ab. Exting. 934, pl. 9; Sug. V. & P. 461–2, ed. 9.]
[|| Bro. Abr. Exec. pl. 174; Exting. pl. 57; 1 Ld. Raym. 520; 2 Roll. R. 472.]

marries, and afterwards the reversion descends upon his wife, the term continues. So, also, it is conceived, the rule holds in the instance of *curtesy;* as where the husband lessee for sixty years marries the reversioner, who afterwards dies before the expiration of the term by effluxion of time, the term continues during the wife's life, while the husband is seised in her right; and it should seem also, after her death, while he is tenant by the curtesy; although a doubt has been intimated as to the latter point. Again, in the case of executor or administrator, as where lessor having the freehold in his own *right, *481 the term devolves upon him as executor or administrator of the lessee. (*a*)

57. (7.) *Another requisite* to produce the merger of two estates meeting in the same person, is, that *both estates must be legal*, or *both equitable;* and with reference to this rule, it is immaterial whether the union is produced by act of law, or by act of the party. (*b*)

58. Thus, where an estate was conveyed to A in fee, in trust for B in fee, and a legal term was vested in B, no merger took place, and accordingly it was held that the term would have been assets (if required) for the payment of simple contract debts. (*c*)

59. Again, where a lease for years is vested in A in trust for B, and the legal estate of the immediate reversion in fee devolves either by descent or conveyance upon B, in trust for C, in fee, no merger takes place.

60. But in the last case, had the equitable reversion in fee vested in B by descent or conveyance, a merger in equity of the beneficial ownership of the lease, in the equitable fee in B, would have been the consequence of their union.

61. III. In the next place, we proceed to consider in what instances the union of two estates or interests in the same person does *not* produce the consequence of merger: and the first exemption we shall notice, is that of an *estate tail*, which *does*

(*a*) 1 Inst. 338, b. Bac, Ab. Lease, R. Jenk. Rep. 73, case 38. Bac. Ab. Lease, R. Platt *v.* Sleap, Cro. Jac. 275. Bracebridge *v.* Cooke, Plowd. Rep. 418. Bulst. 118. Godb. 2, and see Platt *v.* Sleap, *ubi sup.* Bac. Abr. Lease, R. 1 Inst. 338, a.

(*b*) (Den *v.* Van Ness, 5 Halst. 102.)

(*c*) Dowse *v.* Percival, 1 Vern. 104. Thruxton *v.* Att.-Gen. ib. 341. *Supra*, tit. 12, ch. 2, ss. 30, 31. 3 & 4 Will. 4, c. 104.

not merge in a remainder in tail, nor in the remainder or reversion in fee, when the two estates unite in the same person, and in the same right.

62. This exemption results from the statute *De Donis Conditionalibus*,† which preserves the estate in the line of succession to the heirs in tail, according to the form of the gift, so long as there are issue under the entail. (*a*)

483* *63. (2.) Another instance of the union of two estates without merger, as before notice, is where they are held in *different rights*, and the union takes place by *act of law*.

64. In reference to this exception it may be observed, that a person may hold an estate in *autre droit*, in the following characters, namely, as a husband or wife, as executor or administrator, and as member of a corporation aggregate in his corporate capacity. A person having a momentary seisin to serve uses, may be said to have such seisin in *autre droit*, as where A is lessee for years, and the reversion in fee is conveyed to him and his heirs to certain uses; exemption from merger, however, in this last case, is expressly provided for by the Statute of Uses, as before noticed. But as between trustees and *cestui que trust* the exception now under consideration does not apply, but the merger will take place at law, although the interests of third persons will, nevertheless, be preserved, in equity. (*b*)

65. Thus, if A has an estate for the life of B in trust for C, and the inheritance descends upon A, a merger will take place of his estate for the life of B; but he will in equity be deemed a trustee for C of the reversion, during the life of B.

66. (3.) Another instance of union without merger is, where the two estates are *limited by the same instrument, to take effect at the same time;* for, in such case, merger will not take place, so as to destroy an intervening contingent remainder, in

484* which third *persons are interested. Thus, in the case supposed in a former section, where an estate is limited to A for life, remainder to his first and other unborn sons in tail, remain-

(*a*) 2 Bl. Com. 177. Wiscot's case, 2 Rep. 61. Roe *v.* Baldwere, 5 T. R. 110.

(*b*) 1 Inst. 338, b. Jenk. 5. Cent. 200. See 3 Prest. Conv. 312, 532, &c. *Infra*, ss. 100, 105.

[† 13 Edward I.]

der to A in fee: the union of the life-estate with the reversion in fee, is qualified, so as to let in the contingent remainders when they arise. (*a*)

67. The effect is the same where a testator devises lands to A for life, remainder to the first and other unborn sons of A in tail, and does not devise the reversion in fee, which at the testator's death, descends upon A as his heir at law. In this case, the reversion in fee devolves upon A at the very moment, and by the same event, which brings the devise into operation. If the descent of the reversion in fee upon A had been *mediate*, from the subsequent death of the testator's heir at law, the merger of A's life-estate, and the consequent destruction of the contingent remainder, would take place. (*b*)

68. So, where an estate is limited by the same deed, to two men, and the heirs of their bodies; or to A and B for their lives, with remainder to the heirs of one of them; in each of these instances the donees have an estate for life in joint-tenancy; for, otherwise, the quality of the life-estate, by the union of the inheritance, would be changed by severance to estates in common. (*c*)

69. But where the accession of the particular estate to the reversion, or of the reversion to the particular estate, does *not* take place in the *same instant* of time, there merger ensues; and it is immaterial, whether the accession is occasioned by act of law or of the party: as where lands are limited to two persons for their lives as joint-tenants, and the reversion in fee subsequently devolves upon, or is purchased by, one of them, merger takes place, and a consequent severance. (*d*)†

70. With respect to copyholds it should be observed, that the merger produced by accession of the reversion to the particular estate, upon which a contingent remainder depends, does not destroy the contingent remainder, for it is preserved by the estate in the lord. (*e*)

(*a*) Archer's case, 1 Co. 67. Plunket *v.* Holmes, 1 Lev. 11. Sir T. Raym. 28. Boothby *v.* Vernon, 9 Mod. 147, s. 11.

(*b*) *Supr.* tit. 16, c. 4, ss. 22–26. Also s. 29, of this chapter.

(*c*) Purefoy *v.* Rogers, 2 Saund. 386. Lit. s. 283. Rogers *v.* Downs, 9 Mod. 293.

(*d*) Kent *v.* Harpool, T. Jones, R. 76. 1 Vent. 306. Hooker *v.* Hooker, Ca. Temp. Hardw. 13.

(*e*) Fearne, Cont. Rem. 318, ed. 8. 2 Vern. 243.

[† Wiscot's case, or Giles *v.* Wiscot, 2 Rep. 60; Lit. s. 283, et com.]

71. Where, however, the *interest of third persons is not concerned*, the union in the exception mentioned in section 66, produces absolute merger. Thus, where an estate is limited to A for the life of B; remainder to A for his own life; or a limi-
485* tation* is to A for ninety-nine years, remainder to A for life, in both these instances merger will ensue, assuming that no third persons would be thereby prejudiced. (*a*)

72. *Another exemption* from merger occurs in the case of an *executory devise of a term* to A for life, with a *further devise over* of the term, after the death of A to B; and the reversion by descent or otherwise devolves upon A; the merger of A's life-estate, will not prejudice the executory bequest to B. †

73. Mr. Preston states the rule respecting executory devises thus: "No one can destroy an executory interest, merely as such, in another person, either by alienation, merger, or surrender. This is one of the peculiar qualities of an interest under an executory devise of a freehold, or an executory bequest of a chattel quality." (*b*)

74. The case of Hammington *v.* Rudyard is an illustration of Mr. Preston's observation in respect of chattels; and he cites the cases of Goodright *v.* Searle, and Goodtitle *v.* White, as instances of the rule, as it regards executory devises of freehold interests. The reader should, however, be reminded that the rule, as above stated, requires some qualification respecting executory devises limited after an estate tail; in which case a recovery by the tenant in tail will bar them. But the cases of Goodtitle *v.* White, and Goodright *v.* Searle, seem, as indeed Mr. Preston appears to suggest, referrible to the learning of extinguishment. (*c*)

75. But although an executory devise, not limited after an estate tail, cannot be destroyed by alienation, merger, or surrender, as above observed, still while in contingency, it is not an estate; and therefore cannot prevent the union of the particular

(*a*) Dyer, 10 b. Lewis Bowles' case, 11 Rep. 83 in 7th Resolution. 3 Prest. Con. 376, ed. 3.
(*b*) 3 Prest. Con. 593, ib. 259. Pells *v.* Brown, Cro. Jac. 590.
(*c*) 2 Wils. 29. 15 East, 174. Fearne, Cont. Rem. 419, 423, ed. 8. Lanesborough *v.* Fox, 1 Ca. Tal. 262.

[† Fearne, Cont. Rem. 421, ed. 8; Hammington *v.* Rudyard, cited 10 Rep. 52; Sup. p. 395, s. 11; Lee *v.* Lee, Moor, 268.]

estate with the reversion in fee, so as to preserve contingent remainders depending on such preceding particular estate. This may be illustrated by the following case which recently occurred in practice. (*a*)

76. A testator devised lands to A for life, and after his decease to such child of A as, at the time of A's death, should be his second son then living, and the heirs and assigns of such second son; but in case A should not at the time of his death * have a second son, or, having such, he should die *486 under the age of twenty-one years, and without lawful issue living at his death, then to A in fee. A (not having a second son) concurred with the heir at law of the testator in conveying the lands to B and his heirs. In the above case there were two concurrent contingent remainders in fee; one to the unborn second son, the other to A, if he had no second son at his death. Besides these contingent remainders, if the first contingent remainder should vest by A's having a second son, there was an executory devise over, to defeat it, if such second son should die under twenty-one, and without leaving issue living at his death. By the conveyance the particular estate of A merged by its union with the reversion in fee, conveyed by the testator's heir at law to B, and thereby the contingent remainders were destroyed. The executory devise to A, though not barred, was bound in equity by the conveyance to B, who thereby acquired an absolute estate of inheritance in fee simple.

77. (5.) A *further instance* of the union of two estates without merger, is thus stated by Mr. Preston:—"The union of two estates in the same person by means of the *joint act of the respective owners* of the estates, with an *intention that the estate of their assignee should continue for the collective time of their several estates*, will not be any cause of merger." And he considers Bredon's case, and the other authorities which he cites, as fully establishing the above proposition. (*b*)

78. In Bredon's case, A was tenant for life, with remainder to B in tail, with remainder to C in tail; A and B concurred in levying a fine *come ceo*, to a stranger in fee, reserving a rent-charge of £40 a year to the tenant for life. B died without issue living A; and C, the second tenant in tail entered. On a dis-

(*a*) Prest. Conv. 495, s. 72, (*b*) 3 Prest. Conv. c. 13. *Supr.* s. 36, et seq.

tress by A the tenant for life for his rent, and on a replevin and avowry, a question arose upon A's right to distrain, and whether his life-estate was not merged by its union with the next estate of inheritance. The Court of C. B. gave judgment for the avowant, thereby deciding that the life-estate of A was a continuing interest. (*a*)

79. The leading point for which this case is frequently cited is, that the fine did not work a discontinuance; the tenant for life, and B, the remainder-man, thereby only conveying what each might lawfully give. It is also reported to have been said by the Court, that where A, tenant for life, and B, tenant in
487 * tail, * make a feoffment by deed to a stranger, this also is no discontinuance; and that although he in the first remainder dieth without issue, the feoffee shall enjoy the land during the life of the tenant for life. But if a feoffment be made *by parol*, then it is a surrender of the tenant for life, and the feoffment of him in remainder.

80. A *dictum* in Treport's case, and the opinion of Sir Henry Hobart in the Earl of Clanrickard's case, are also cited as authorities in support of the preceding proposition of Mr. Preston, who accounts for the objection made by Hale, C. J., to Bredon's case, by his not adverting to the distinction there made between a feoffment by deed and without deed; for he remarks that Breden's case is an authority merely for the point, that the estate for life has continuance in those cases only, in which the remainder may pass, as a remainder, and the estate for life pass as a continuing estate. (*b*)

81. The reader will observe that in Bredon's case, the estate in remainder was an estate tail, which being larger in quantity than the previous estate for life, the equality of the estates could be no objection to the merger; so that it may be considered a decision strongly in support of the case supposed by Mr. Preston, of union without merger, where A, tenant for the life of B, and C, tenant in remainder for the life of D, concur in conveying their respective estates to E, with the intent of conferring upon him the collective ownership and duration of both estates.

82. If Bredon's case, and that supposed by Mr. Preston, turn

(*a*) 1 Rep. 77. (*b*) 6 Rep. 15. Hob. 273. Palm. 359. 1 Vent. 160.

solely upon the intention of the parties, they must be considered as anomalous instances of the intention,† preventing the legal *consequence of the union of two estates in the *488 same person, in the same right: but it is submitted, that the principle upon which these cases may in a measure depend, is that which was noticed in former sections of the present chapter, to which the reader is referred; and where he will find another instance in terms for years of union without merger. The principle alluded to, is, that one of the two estates being in possession, and the other in *remainder* and not in reversion, there is nothing incompatible in their union as continuing interests in the same person, since that union does not involve the inconsistent relations of *dominus et tenens.* (*a*)

83. If the above be the true principle, the following conclusion may be drawn; that whether the two equal estates are for life or years, if the latter be limited by way of remainder, and not a portion of the reversion, merger will not be the consequence of their union in the same person, whether they are conveyed to that person for the purpose of conferring the combined ownerships of both estates or not; *sed qu.*

84. Although the estate *pour autre vie* of A in the case before supposed, may for some purposes have continuance, while it is distinct from the reversion, yet if the estates *pour autre vie* of A and C, when vested in E, were to become united with, and form

(*a*) *Supra*, ss. 40, 44.

[† The *intention* of the parties is *not the governing principle of merger;* for while in some instances the law of merger, from favor to the intention of the parties, is held to be inapplicable, yet in others, merger is consequent upon the union of two estates, in direct opposition to the intention of the parties, either apparent or implied. Perhaps no general rule in reference to the intention can be deduced, which would embrace every instance; but it is suggested, as in some measure tending to a classification of the cases, that merger, in reference to the intention, is excluded chiefly in those instances, where the two estates, which would otherwise merge, are created by the same instrument, or at the same time, or by the same contemporaneous transaction, as will be seen in the perusal of the present chapter; but that where two estates unite in the same person, not as above noticed at the same time and by the same deed or transaction, but at a period subsequent to the original creation of the estates, and by a distinct act of law or of the party, there, in most instances, merger will be the consequence of union, without regard to the intention of the parties. There are however, some instances, where union of estates takes place, irrespective of any manifestation of intention whatsoever in reference to merger; and merger is not uniformly the consequence of union in such instances.

an integral part of the inheritance, it is conceived they would both merge, and any contingent remainder, intervening between C's estate and the reversion in fee, or the next vested remainder, would be destroyed. (*a*)

85. Thus, if the lands were limited to A for the life of B, with remainder to C for the life of D, with remainder to the first and other unborn sons of E in tail, with remainder to F in tail or in fee; if E, to whom the estates *pour autre vie* of A and C, as before supposed, were conveyed, should have concurred with F in levying a fine with proclamations to G in fee, the estates *pour autre vie* of A and C would no longer be considered as continuing interests to support the contingent remainders to the first and other sons of E, but would merge; and the contingent remainders would consequently be destroyed.

489* *86. The recent case of Hasker *v.* Sutton is an authority that the life-estate, in union with the reversion, by the act of the parties, is not a continuing interest to support the intervening contingent remainders. (*b*)

87. There the estate was devised to A for life, remainder to the first and other unborn sons of his body in tail male, with several contingent remainders over. The tenant for life (being a bachelor) in order to destroy the contingent remainders concurred with the heir at law of the testator, in a feoffment to B and his heirs, to the use of A and his trustee, in the usual manner to bar dower; and a fine with proclamations was levied in pursuance of a covenant contained in the deed of feoffment, and the uses were declared to enure to A and his trustee to bar dower. The Court of C. B. upon a case, sent by Sir John Leach, V. C., decided, that A acquired the absolute inheritance in fee discharged from the remainders.

88. The same point was decided in Doe *v.* Howell. There the devise, in events which happened, was in effect to A the testator's daughter for life, remainder to any child or children she might have living at her death. The words of the devise were, to the testator's grandson John, the son of A, and his heirs; but in case his grandson should die before his, the testator's daughter, and she should have no other child living at her death, then his will was, that his daughter should devise the said premises

(*a*) *Supra*, s. 81. (*b*) 1 Bing. 500.

to such persons as she should think proper. John survived the testator, but died an infant. A had another son, William, the lessor of the plaintiff. A was the testator's heir at law, and married a second time, and, with her husband, levied a fine with proclamations, and conveyed away the property to a stranger, under whom, by mesne conveyances, &c., the defendant was in possession. The Court of K. B. decided, that during John's life, the devise to the children of A, living at his death, was an executory devise, but after his death it became a contingent remainder, which the fine had destroyed. (*a*)

89. (6.) Under the present branch of our subject, we again advert to the exception before noticed, that any estate in the releasee, feoffee, or grantee, *to uses*, will *not be merged by its momentary union with the seisin;* as it is transmitted through such releasee, * feoffee, or grantee, to serve the uses to third per- *490 sons; as where A is lessee for years, and the reversioner enfeoffs him to uses, the term is not merged. But where an estate by way of use, capable of producing the merger, is limited to such releasee, &c., of course his term will merge; but this merger does not arise from the transition of the momentary seisin, but from the union of his term with the new estate, limited to him by way of use. (*b*)

90. The protection from merger above-mentioned, is afforded by one of the savings of the Statute of Uses, and it is within the equity of this saving, where the seisin is not merely momentary, but there are several conveyances making parts of the same assurance to raise the uses, and one of these conveyances gives the termor, an estate which must remain in him until the instruments are brought into complete operation; as in Ferrers *v.* Fermor. (*c*)

91. So also in Fountain *v.* Cook, where it is said, if a lessee for years is made tenant to the *præcipe* for suffering a common recovery, that doth not extinguish his term; because it was in him for another purpose, to which the whole Court agreed. (*d*)

92. (7.) In concluding this division of our subject, the reader is reminded that a *general power of appointment*, when reserved

(*a*) 10 Bar. & Cr. 191.
(*b*) 27 Hen. 8, *sup.* s. 72. Cheney's case, cited 4 Leon. 234, S. C. Moore, 196, pl. 345.
(*c*) 27 Hen. 8, c. 10, s. 9. Cro. Jac. 643. *Supra*, tit. 9, c. 1, s. 40.
(*d*) 1 Mod. 107. Ib. s. 42. See also Sug. V. & P. 464, ed. 9.

through the medium of a *conveyance under the Statute of Uses, may coexist with the absolute fee* in the donee of the power, to whom, in default of appointment, the fee is limited.† Such a power, however, *cannot* be reserved in a *conveyance at common law*, and Goodill *v.* Brigham has been supposed to be an authority in support of the last proposition.‡ [1]

93. Where, however, an estate is conveyed to such uses as A should appoint, with a limitation in default of appointment to B in fee, and the inheritance, upon B's death, descends to A, it does not appear to be quite settled, whether the power will be extinguished by this union. Sir Edward Sugden, in his valuable treatise on powers, expresses an opinion in support of the existence of the power, conceiving that the case of Maundrell *v.* Maundrell overruled the principle of the decision of Cross *v.* Hudson; the cases, however, are distinguishable. Mr. Sanders, adverting to a power of revocation in a stranger, and
491* that such *stranger cannot release or extinguish it, adds, "But if the donee of the power, in this case, should acquire the fee simple of the estate, the power would become unnecessary, and would be consequently extinguished." Mr. Sanders, however, does not cite any authority in support of his opinion. (*a*)

94. But the absorption of the power in the fee, when in the same person, does not properly fall within the learning of merger, but of extinguishment: for the power is not an *estate*, and merger, as we have seen, results from the union of two or more *estates*.

95. We proceed, in the fourth and *last place*, to consider the *consequences of merger;* and *first, upon the party* whose estate is merged.

96. When there are *charges upon the reversion*, and the preceding estate is merged therein, and the reversion becomes the estate in possession, the charges are accelerated. Thus, before

(*a*) See Cross *v.* Hudson, 3 Bro. C. C. 30. Sugd. on Pow. p. 91, ed. 1830. (1 Sugd. Pow. 109, 110, 6th ed.) 7 Ves. 567. 1 Sand. on Uses, p. 174, ed. 4.

[† Ray *v.* Pung, 5 Mad. 310; 5 B. & Ald. 561, S. C.]

[‡ 1 Bos. & Pul. 192. See Vol. IV. tit. 32, c. 13, s. 7.]

[1] See *ante*, tit. 32, ch. 19, § 29, note.

the statute 3 & 4 Will. IV. c. 74, s. 39, where tenant in tail levied a fine with proclamations, and the reversion in fee subsequently descended upon, or was purchased by him encumbered, the base fee acquired by the fine merged in the reversion; so that as regarded the party whose interest was merged, he must have sustained all the consequences of merger; the rule being that a man shall not derogate from his own act. (*a*)

97. But by section 39 of the above statute, the base fee becomes enlarged to an absolute fee, and the reversion is entirely excluded, and the consequence would seem to follow, that the charges on the reversion are annihilated.

98. So also, where a *condition is annexed to the estate merged*, the merger of the estate extinguishes the condition; and again, where tenant for years takes a conveyance of the freehold or inheritance subject to a condition, if the condition takes effect to defeat the estate, the term will not be revived. (*b*) †

99. Thus, where lessor mortgaged the reversion in fee to the lessee for years, and, at the day for payment of the money, he paid the money; it was holden, that the lease for years was not revived, but utterly extinct. (*c*)

100. (2.) *Secondly, with respect to third persons having interests *derived out of the estate merged.* In such cases *492 equity interferes in their behalf to preserve the benefit of the charge or other interest, although at law merger takes place. (*d*)

101. Thus, if tenant for life makes a lease, grants a rent-charge, or confesses a judgment, and afterwards the reversion descends upon or is purchased by him, the lease and the charges remain for the benefit of the persons entitled thereto. (*e*)

102. The case of Webb *v.* Russell, illustrates the preceding observation. There William Stokes and Richard Webb, described to be the mortgagee of the premises, demised them in 1780 to Russell for eleven years, from the 29th of September, at the yearly rent of £200, payable to Stokes and his assigns.

(*a*) Errington *v.* Errington, 2 Bulst. 42. Roe *v.* Baldwere, 5 T. R. 109, per Lord Kenyon.
(*b*) 1 Inst. 218, b. Mounson *v.* West, Gouldsb. 92.
(*c*) 3 Leon, 6, pl. 17.
(*d*) *Infra*, ss. 105–108.
(*e*) 1 Inst. 338 b.

[† The consequences are the same in the case of extinguishment of copyhold. See 4 Co. 31 a; Watk. Cop. [356.]

Webb, at the time of granting the lease, was possessed of the premises for the residue of an unexpired term of ninety-nine years, commencing on the 24th of June, 1770, subject to an equity of redemption in Stokes. Russell entered into possession under his lease. In 1781, Medley, the reversioner, in fee, conveyed the reversion expectant upon the ninety-nine years' lease to Stokes and Morgan Thomas, who conveyed it to Thackeray in trust for Webb, subject to a proviso for redemption on payment of a certain sum and interest by Stokes to Webb. In 1785, Webb died, who, by his will, bequeathed all his worldly estate to the plaintiff, whom he appointed executrix, and who claimed the reversion for the residue of the ninety-nine years term, subject to the equity of redemption in Stokes, and to the money thereupon secured to Webb as legatee. By lease and release of the 12th and 13th of February, 1787, Thackeray released to the plaintiff the reversion of the premises in fee, freed from all equity of redemption; whereby she became seised of the reversion in fee, expectant upon the term of eleven years. The Court of C. B. held, that the term of ninety-nine years merged in the reversion in fee, so that the reversion of the term of eleven years, which was an underlease granted out of the ninety-nine years, term was gone; and with it the rent incident thereto; but that the underlease continued, discharged of the rent and covenants, except by force of the personal contract. (*a*)

103. In Burton *v.* Barclay the reader will see a case in which the doctrine of Webb *v.* Russell was discussed; but, from the peculiar circumstances of which, the reversion of the original lease was held not to have passed to the lessor, so as to merge. (*b*)

493* *104. The statute 4 Geo. II. c. 28, s. 6, remedies the legal consequences of surrender of leases upon renewal in certain cases. It authorizes the renewal of the original lease, without a surrender of the underleases, and gives the ground landlord, the original lessees, and the under-lessees, the same mutual remedies that they would have had if no surrender had been made. A similar provision is contained in the statute 39 & 40 Geo. III. c. 41, which enables bishops to renew leases, by subdividing tenements and apportioning rents.

(*a*) 3 T. R. 393. Stokes *v.* Russell, Ib. 678. 8 Rep. 92. 1 Inst. 338 b. 1 Moor, 94. Thorn *v.* Woolcombe, 3 Bar. & Adol. 586. (*b*) 7 Bing. 745.

105. It may here be observed, that in order to protect the interests of third persons, having charges upon the estate which has been destroyed at law by merger, *equity will, in some cases, interpose* its peculiar jurisdiction, by decreeing possession of the lands, for the period of the estate merged, or a conveyance to revive the legal estate, according to circumstances, so as to answer the purposes of justice. And, it is immaterial, whether the estate charged with the trust merges in the estate which the trustee has in his own right, or the estate which the trustee holds in his own right, merges in the estate vested in him as trustee, or by direct conveyance, or by descent upon him as heir at law of a deceased trustee; a court of equity will relieve in either of these cases. (*a*)

106. In Saunders *v.* Bournford, John Allen, seised in fee, granted a term of one thousand years to Richard Saunders, and covenanted for further assurance: Richard Saunders, upon the marriage of his son John, assigned the residue of the term to him. In 1662, John Saunders assigned the term to Thomas Harris and John Allen, upon certain trusts for the benefit of his wife and children. John Allen the trustee, was grandson of the original lessor; and, when the assignment was made to him, was seised of the reversion in fee. The beneficial interest in the term, by mesne assignment, became vested in Nicholas Saunders the plaintiff; and upon the claim by Isabella Allen, the heir at law of John Allen, the original lessor to a moiety, on account of the merger which took place in that moiety by the assignment in 1662 to Thomas Harris and John Allen, Lord Nottingham, C., decreed that Nicholas Saunders the plaintiff, should hold the premises notwithstanding the merger of the moiety, and that the heir at law should make a further assurance of the residue of the term. (*b*)

*107. In further illustration of the doctrine now under consideration, the case stated in the next section, and which recently occurred in practice, may be adduced as furnishing an instance of merger at law of a fractional part of two estates meeting together in the same person in different rights, each estate being held in trust for third persons. *494

(*a*) *Sup.* tit. 8, c. 2, ss. 47, 48. Danby *v.* Danby, Finch, 220. 3 Prest. Con. 319. Ed. 3. And Charlton *v.* Low, 3 P. Will. 328.

(*b*) Finch, 424. See also, Duke of Norfolk's case, 3 Ch. Ca. 15. *Sup.* p. 397, *s.* 13.

108. In the case alluded to, and which is by no means of unfrequent occurrence, A, being seised in fee, conveyed an estate to the use of B and C, for one thousand years, in trust, for raising portions, and subject thereto, to the use of himself in fee. A, by his will, made some time after the settlement, devised the estate to C and D in fee, upon trusts, and died. By the union of the one thousand years' term, of which C was trustee jointly with B, with the inheritance devised to him and D, as joint-tenants in fee, merger of the term took place in the moiety of C, and a consequent severance; and the term in the other moiety continued a subsisting legal interest in B. But, notwithstanding this merger of the term at law in a moiety, the Court of Chancery directed the parties entitled to the inheritance to restore the term in the moiety which had merged; and to execute such conveyances, as would legally secure the equitable charges upon the entirety of the estate, comprised in the original term. (*a*)

109. If in the above case the term had been satisfied, and attendant upon the inheritance, the consequence would have been an absolute destruction of the term in a moiety of the estate; and the term in the other moiety only would have remained attendant upon the inheritance.

110. In the *third place*, the consequences of merger *affecting the estate* wherein the merger takes place, or in which the merged estate is absorbed, remain to be noticed.

111. (3.) As before observed in the instance of a particular estate merging in the reversion, the reversion is accelerated; and not only are the charges, which originally attached upon it accelerated, but the charges affecting the particular estate will also attach upon the reversion. (*b*)

112. Thus, in Errington *v.* Errington, it was said by Doddridge, J., if tenant for life grants a rent-charge, and he in reversion also grants a rent-charge, and the tenant for life surrenders to the reversioner, the land shall now be presently charged with two rents. (*c*)

495* *113. The consequences of merger upon the estate in

(*a*) *Vide supr.* Vol. I. p. 361, per Lord C. B. Gilbert. *In re* Frank, 15 Aug. 1832, MS.
(*b*) *Sup.* s. 96.
(*c*) 2 Bulst. 42, 46. Shelburne *v.* Biddulph, 6 Bro. P. C. 360. Toml. ed. Symonds *v.* Cudmore, 4 Mod. 1 S. C. 1 Salk. 338.

which the merged estate is absorbed, may be further noticed in the instance of descent. As where an estate for two or more lives is granted to A and her heirs, which upon her death being a descendible freehold, devolves upon B her son as her heir at law, and is descendible to him and his heirs *ex parte maternâ;* afterwards the reversion in fee, immediately expectant on the lease for lives, descends upon B *ex parte paternâ*, the estate for lives is merged; and the whole fee becomes descendible *ex parte paternâ* and so *e converso.*

114. Again, where, before the recent statute for abolishing fines and recoveries, tenant in tail *ex parte maternâ*, converted the estate tail into a base fee, and the reversion in fee descended upon him *ex parte paternâ*, or he purchased the reversion in fee, the base fee merged: and the reversion in fee, thus accelerated into possession, was descendible *ex parte paternâ.* (*a*)

115. But by that statute, the law is now altered in the above case, for the base fee, as before noticed, is enlarged into a fee simple absolute, and it is conceived such fee simple will be descendible in the course of descent which governed the base fee, that is *ex parte maternâ.*

116. But if the tenant in tail *ex parte maternâ* had, in the case last supposed, suffered a common recovery, as he thereby only enlarged the estate tail into a fee, that fee would be descendible *ex parte maternâ;* but this case does not involve the doctrine of merger. (*b*)

117. The various examples before adduced, will abundantly suffice to show the consequences of merger upon the party whose estate is merged, upon the persons having interests derived out of such estate, and upon the estate in which the merged estate is absorbed. The consequences of *extinguishment* will be found closely resembling those of merger, as will be seen from the following pages.

118. V. *Extinguishment*, as before observed, materially differs from merger, the former denoting the annihilation of a collateral *subject, right or interest* in the estate, out of which it is derived, while the latter is the absorption of the less in the greater of two or more estates. Nevertheless, the learning of the one is so closely analogous to the principles which govern the other,

(*a*) 3 & 4 Will. 4, c. 74, s. 39. See 1 Atk. 480. Price *v.* Langford, Carth. 140, S. C. 1 Salk. 337. (*b*) Carth. 140–1.

that a treatise on merger would be very defective, which
496* *did not, in some measure, exhibit the learning of extinguishment. (*a*)

119. In addition to the remarks already made, some further observations will now be offered upon this latter subject in concluding the present chapter. (*b*)

120. When the legal estate and equitable ownership unite in the same person in the same right, the latter is extinguished in the former, the maxim being, that a man cannot be a trustee for himself. The same maxim is applicable to the extinguishment of equitable charges in the legal ownership uniting in the same person in the same right as will be noticed in a future page. (*c*)

121. A further illustration of the effects of extinguishment is afforded in the learning of descents. Thus, where the legal fee descends *ex parte paternâ*, upon a person seised in fee of the equitable ownership *ex parte maternâ;* in such case the legal estate will govern the course of descent. (*d*)

122. So again, where the reversion in fee *ex parte paternâ*, descends upon a person seised of a rent-charge in fee *ex parte maternâ*, the latter will be extinguished, to the exclusion of the maternal heirs. (*e*)

123. On the extinguishment of powers the reader is referred to Title XXXII. Chapter XIX.; where he will find that branch of the subject now under consideration, fully discussed. (*f*)

124. We shall conclude with noticing some important distinctions in reference to the *extinguishment of charges* by the union in the same person, of the charge, with the lands upon which the charge is imposed.

125. *First*, where the *person entitled to the charge* acquires only a *partial interest in the land*, the charge will not be extinguished or suspended, beyond the extent of the owner's interest, as will appear from the authorities cited in the note below.†

(*a*) *Sup.* s. 4. (*b*) *Sup.* ss. 4, 98, 108. Tit. 8, c. 2, s. 31. Tit. 28, c. 3, ss. 3, 4, &c.
(*c*) Phillips *v.* Bridges, 3 Ves. 120, 126, per M. R. Goodright *v.* Wells, Doug. 770. 3 Ves. 339, S. C. *Vide sup.* Tit. 12, c. 2, s. 34.
(*d*) Wade *v.* Paget, 1 Bro. C. C. 361. Goodright *v.* Wells, *ubi sup.* Selby *v.* Alston, 3 Ves. 339. (*e*) See also Goodtitle *v.* White, 15 East, 174. (*f*) *Et vid. sup.* § 91, 92, 93.

[† Clarke *v.* Rutland, Lane, 111; Chester *v.* Willes, Amb. 246; Price *v.* Seys, Barn. Ch. Ca. 120, 126.]

126. *Secondly*, if the *owner of the charge purchases the inheritance in fee*, or acquires it by devise or descent, the personal representatives, in the absence of any intention in the owner of the inheritance to keep the charge on foot, cannot enforce the charge against the real representative. (*a*)

*127. Thus, in the recent case of Astley *v.* Milles, *497 Richard Milles, being tenant for life of estates settled in strict settlement, bought up some of the charges upon the estate, and had them assigned to a trustee in trust for himself. In November, 1818, he purchased the reversionary interest in the estate of his grandson Lord Sondes, who was tenant in tail next in remainder, and they suffered a recovery, the uses of which were declared to enure to Richard Milles in fee. In the following December, Richard Milles made his will, devising the estate so purchased (subject to the charges that might be subsisting thereon at the time of his death,) in strict settlement; and he appointed his wife Mary Elizabeth Milles, his sole executrix and residuary legatee. By the death of Richard Milles, the limitations, prior to the remainder in tail recently in Lord Sondes, failed. Upon a bill filed by the personal representatives of the widow and executrix of Richard Milles, to have the charges, purchased by him, raised out of the estates, Sir John Leach, M. R., decided, that the charges merged; and parol evidence was admitted in support of the presumption that testator intended to discharge the estates, and not to devise them *cum onere*. (*b*)

128. Again, in Tyler *v.* Lake, Henry Lord Teynham, by his will devised his real estates to his brother the Honorable John Roper in fee, charged with £1,000, which he gave to him in trust for the separate use of his sister Catherine Tyler for life; and after her death as she should by will appoint, and in default of appointment, to be retained by his brother for his own use. The testator died in 1800, leaving his brother John his heir, who became Lord Teynham, and who by his will devised the estates to trustees in trust for Catherine Tyler and Charles H. Tyler, as tenants in common in fee, subject to his debts, &c. and all incumbrances affecting those estates. By a codicil he directed his personal estate to be first applied in payment of his debts, &c. After his death the trustees conveyed the estates to Catherine

(*a*) Chester *v.* Willes, note (a). (*b*) 1 Sim. 298.

Tyler and Charles H. Tyler, as tenants in common in fee, subject to the £1,000 and to the debts and legacies of John Lord Teynham. They having agreed to make partition, one moiety of the estates was conveyed to Catherine Tyler in fee, subject to a term for indemnifying Charles H. Tyler from the £1,000: and
498* * the other moiety was conveyed to him in fee. Catherine Tyler afterwards mortgaged her moiety in fee, and by her will, without referring to the £1,000, disposed of her personal estate in general terms. Upon a question whether the charge merged in the fee, Sir L. Shadwell, V. C., decided in the affirmative. (*a*)

129. But if there is evidence of the *intention* of the owner of the fee that *the charge should not merge*, or where the party is *incapable of expressing any intention*, and it appears to the Court to be most advantageous to him that the charge should continue, in such cases, *the charge will not sink*. (*b*)[1]

130. Thus, if an *infant* is entitled to a charge and the inheritance descends upon him, in that case, during infancy, the charge will not be extinguished, to the prejudice of the infant's executors or administrators, in favor of the heir. (*c*)

131. This exception is not made in respect of the estate of a *lunatic;* for if a charge upon his real estate devolves upon him, it shall sink for the benefit of the heir: the maxim being, that there is no equity between the heir, and the personal representative of a lunatic. (*d*)

132. *Thirdly*, we notice some *further distinctions*, in reference to the *duration* or *quantity of interest*, which the person *paying off* a charge has in the estate charged; that is, where he has

(*a*) 4 Sim. 351.
(*b*) Thomas *v.* Kemeys, 2 Vern. 348. Forbes *v.* Moffatt, 18 Ves. 384.
(*c*) Powell *v.* Morgan, 2 Vern. 90. Thomas *v.* Kemeys, *ubi sup.*
(*d*) Compton *v.* Oxenden, 4 Bro. C. C. 397.

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[1] The rule in the text is now generally approved and applied in the United States; though, in some older cases, not held so clearly as at present. See Freeman *v.* Paul, 3 Greenl. 260; Hatch *v.* Kimball, 2 Shepl. 9; 4 Shepl. 146, S. C.; Pool *v.* Hathaway, 9 Shepl. 85; Campbell *v.* Knights, 11 Shepl. 332; Bailey *v.* Willard, 8 New Hamp. 429; Cooper *v.* Whitney, 3 Hill, 95; Starr *v.* Ellis, 6 Johns. Ch. 393; James *v.* Johnson, Ibid. 417, afterwards reversed on appeal, in the Court of Errors, but on other grounds. See 2 Cowen, R. 246, 284, 285, 313, 318. And see *ante*, tit. 8, ch. 2, § 37, note, and cases there cited.

only a freehold interest, and where an estate of inheritance in fee or in tail.

133. Thus, where a *tenant* for life, or tenant in tail after possibility of issue extinct, *pays off a charge*, in the absence of intention to the contrary, the charge will continue for the benefit of his personal representatives; and notwithstanding the reversion in fee is vested in the tenant for life, there being an intervening estate.†

134. But where the charge is paid off by the *tenant in tail* having *power of alienation*, the presumption will be, that he intended to exonerate the estate, unless there exists evidence of a contrary intention.‡

*135. So, *a fortiori*, if the charge be paid off by the *tenant in fee simple*. In order, therefore, to keep up the charge, there should be an assignment of the incumbrance, or a declaration of an intention to keep it on foot.§ *499

[† Shrewsbury *v.* Shrewsbury, 1 Vez. 227; Earl of Buckingham *v.* Hobart, 3 Swanst. 186, 199, per Lord Eldon; *Vid. Sup.* Vol. I. p. 420.]

[‡ Wyndham *v.* Lord Egremont, Amb. 753; Jones *v.* Morgan, 1 Bro. C. C. 206; 3 Swanst. 199.]

[§ Chandos *v.* Talbot, 2 P. Wms. 602–604. For further information on the subjects of merger and extinguishment, see Viner's Abridgment under those titles, and Mr. Preston's third volume of Conveyancing.]

END OF VOL. VI. OF CRUISE'S DIGEST.

A

DIGEST

OF

THE LAW OF REAL PROPERTY.

BY WILLIAM CRUISE, ESQ.

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REVISED AND CONSIDERABLY ENLARGED

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OF

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THE END.